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Law Reports : Rolls Court

REPORTS

OF

CASES IN CHANCERY,

ARGUED AND DETERMINED

IN

THE ROLLS COURT

DURING THE TIME OF

LORD LANGDALE,

MASTER OF THE ROLLS.

BY BENJAMIN KEEN, ESQ.

BARRISTER AT LAW.

KING'S COLLEGE LIBRARY LONDON

VOL. II.

1838, 1839.—1 & 2 VICTORIA.

COMPLETED BY C. BEAVAN, ESQ.

BARRISTER AT LAW.

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Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor.*

Sir JOHN CAMPBELL, *Attorney-General.*

Sir ROBERT MONSEY ROLFE, *Solicitor-General.*

ADVERTISEMENT.

This volume, originally commenced by Mr. *Keen* alone, has, in consequence of the severe indisposition of that gentleman, been completed from page 553. by Mr. *Beavan.*

MEMORANDA.

Sir *James Allan Park*, Knt., one of the Justices of the Court of Common Pleas, having died during the *Christmas* vacation, 1838, the Right Honourable *Thomas Erskine*, the Chief Judge of the Court of Review, was shortly afterwards appointed to the vacant seat on the bench.

In the vacation after the following *Hilary* term, *William Henry Maule*, Esq., one of her Majesty's Counsel, was, on the resignation of Sir *William Bolland*, appointed one of the Barons of the Court of Exchequer.

George Boone Roupell, Esq., one of the Masters of the Court of Chancery, died in the month of *January* 1838, and *Andrew Henry Lynch*, of the *Middle Temple*, Esq., barrister at law, was appointed to the vacant office.

In the vacation after *Hilary* term 1839, *Samuel Duckworth*, of *Lincoln's Inn*, Esq., barrister at law, was appointed to the office of a Master in Chancery, on the resignation of *Francis Cross*, Esq.

In the vacation after *Hilary* term 1839, the following gentlemen were appointed her Majesty's counsel, viz., *John Stuart*, of *Lincoln's Inn*, *Robert Vaughan Richards*, of the *Inner Temple*, *Samuel Girdlestone*, of the *Middle Temple*, and *Griffith Richards*, of the *Inner Temple*, Esqs.; *William Goodenough Hayter*, of *Lincoln's Inn*, Esq., at the same time received a patent of precedence.

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COURT OF CHANCERY,

March 1839.

IT is hereby declared and directed by the Lord High Chancellor, with the concurrence of the Master of the Rolls and the Vice-Chancellor, That in all cases where a receiver of a landed estate is appointed, with a direction that such receiver shall manage as well as set and let with the approbation of the Master, and such receiver shall, under the provision of the act for the commutation of tithes in *England* and *Wales* (6 & 7 *W.* 4. *c.* 71. *s.* 12.), be deemed, for the purposes of the said act, an owner of such tithes and lands as therein mentioned, jointly with any other person, the Master shall, without special order, receive any proposal regarding the execution of the said act as to such tithes and lands, and shall make his report thereon, which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports made under the sixty-fourth of the General Orders, dated the 3d day of *April* 1828, and, until such report be confirmed, it shall not give any authority to the receiver.

COTTENHAM, C.
LANGDALE, M. R.
LAUNCELOT SHADWELL, V. C.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

1837.

KENT *v.* PICKERING.

July 27, 28.

One of two executors has a right to retain his own debt out of a balance due from both to the testator's estate.

THIS was a creditor's suit on behalf of *George Kent*, and all other the creditors of *John Kent*, deceased, against *Samuel Pickering* and *Robert Cannon*, the executors of *John Kent*. The bill was filed on the 21st of *December* 1832; the answer was put in on the 27th of the same month; and on the same day the usual decree for the accounts was obtained. The Master made his report on the 23d of *February* 1837, which he commenced by stating that he had thought fit to commit the prosecution of the decree, in conformity with the liberty given in that behalf by the fifty-sixth of the New Orders of 1828, to *John Henry Deffell*, a creditor hereinafter named. On the cause coming on to be heard for further directions upon the Master's report, a petition was presented by the Defendant *Pickering*, praying that

1837.

KENT v. PICKERING.

he might be declared to be entitled to the sum therein mentioned, which had been paid by him in respect of two judgment-debts and costs, recovered against him as executor of the deceased debtor, and also to certain other sums, in respect of costs incurred by applications to the Vice-Chancellor, mentioned in the petition; and that he might be declared entitled to receive, out of the testator's estate, his debts of 1043*l.* 3*s.* 9*d.*, and 250*l.* due upon a promissory note with the interest thereon, in preference to the payment of any other simple contract creditor of the testator.

The petition stated, that on the 14th of *November*, seven days before the filing of the bill, *John Chapman* commenced an action against the petitioner and his co-executor for the sum of 241*l.* 4*s.*, due from the testator on two promissory notes given by him to *Chapman*, and that on the same day *Samuel Appleby* and *Richard Charnock* commenced an action against the petitioner and his co-executor for the sum of 4*l.* 7*s.* 2*d.*, due to them for business done by them as attornies. That, notwithstanding the decree in the cause, the Plaintiffs at law proceeded in their actions, and, on the 1st of *December* 1832, obtained judgments therein respectively, *de bonis testatoris, et si non, de bonis propriis*, and that writs of *fieri facias* were issued upon the judgments, and the goods of *Cannon* taken in execution. That on the 5th of *December* 1832, the petitioner and the Defendant *Cannon* applied to the Vice-Chancellor for an injunction, when his Honor ordered that the Plaintiffs at law respectively should be restrained from proceeding in their actions until the 10th of *December* then instant; and that on that day, the Vice-Chancellor ordered that the injunction should be continued, so far as the same related to the goods of the testator, and that the petitioner and the

1837.

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the Defendant *Cannon* should pay the costs of the applications. That the Plaintiffs at law respectively brought actions upon the judgments obtained by them against the petitioner and the Defendant *Cannon*, and that the petitioner paid the amount of the judgment debt and costs in each action. That the testator was, at the time of his death, indebted to the petitioner in the sum of 1043*l.* 3*s.* 9*d.* for goods sold, and money lent, and also in the sum of 250*l.* secured by a promissory note. That on the 16th of *November* 1832, the petitioner retained out of the assets of the testator the sum of 722*l.* 16*s.* 1*d.*, and on the 28th of the same month the sum of 277*l.* 3*s.* 11*d.*, in part satisfaction of what was due to him, with the concurrence of the Defendant *Cannon*.

The petition then stated, that the Master had disallowed the claim of the petitioner and the Defendant *Cannon* to the amount of the judgment debts and costs so paid by the petitioner, and also their claim to the costs incurred in respect of the applications to the Vice-Chancellor; and that the Master had also declined to allow the sums retained by the petitioner by way of discharge to him in taking the accounts. That the Master, by his report, had found that a balance of 1583*l.* 8*s.* 1*d.*, was due from the petitioner; and that he had found the sums above-mentioned, of 1043*l.* 3*s.* 9*d.*, and 250*l.* and interest, to be due to the petitioner from the testator's estate. That, in pursuance of an order, the petitioner had paid into Court, out of his own monies, the sum of 1583*l.* 8*s.* 1*d.*, without prejudice to the question of his right of retainer. That by the Master's report, the specialty debts of the testator appeared to amount to the sum of 264*l.* 2*s.* 5*d.*

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Mr. *Barber* and Mr. *Hall*, in support of the petition.

The executor has a clear right to retain his own debt out of the assets, and this right is not affected by a decree obtained in a suit by the other creditors; nor is it material whether the assets have come to the hands of the executor before or after the decree; *Nunn* v. *Barlow*. (*a*) Neither is this right affected by the circumstance of the assets, or part of them, having been paid into Court. In *Chissum* v. *Dewes* (*b*), the administrator had paid a part of the general personal estate into Court; and Mr. *John Leach* held that his right of retainer would prevail even against the right of the Plaintiff, in a creditor's suit, to have the costs of the suit satisfied. So in *Langton* v. *Higgs* (*c*), the present Vice-Chancellor said he had not the slightest doubt that, notwithstanding the administratrix had paid the money into Court, her right of retainer was unaffected. In the present case the order, under which the money had been paid into Court, reserved the right of the executor; and no act had been done by the executor by which his legal right could be prejudiced. Where there are two executors, the receipt of assets by one is in point of law the receipt of assets by both; and the right of one to retain his separate debt is founded upon a principle analogous to that, upon which the right of a single executor to retain his debt is founded, namely, that he cannot bring an action against his co-executor, and that, if he had not the right of retainer, he would be remediless. Equity follows the law in this respect; and, unless there are any circumstances to take the case out of the general rule, will recognise the right of one of two executors, or of a surviving executor, to

(*a*) 1 *Sim. & Stu.* 588.
(*b*) 5 *Russ.* 29.
(*c*) 5 *Sim.* 228.

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to retain his debt; *Jacomb* v. *Harwood.* (*a*) The only exception to the rule, is where there are two executors or administrators who are both creditors, in which case equity will prevent one from retaining to the prejudice of the other; *Chapman* v. *Turner.* (*b*) As to the executor having suffered judgment to go by default, where there was no defence to the action, Lord *Eldon*, in a similar case, expressly said, that an executor was right in so doing, and that nothing was to be inferred from his having adopted that course, but that he was ready to do whatever a court of law or equity might think proper; *Dyer* v. *Kearsley.* (*c*) It has been held, that even a false plea, if put in merely for the purpose of gaining time to throw the management of the assets into a court of equity, will not deprive an executor of his right to protection in this Court; *Fielden* v. *Fielden.* (*d*) The order made by the Vice-Chancellor, therefore (*e*), which was to restrain the creditor from proceeding against the assets of the testator, but to leave the assets of the executor liable, was not consistent with previous authorities, and the executor ought to be allowed the costs of the applications before the Vice-Chancellor.

Mr. *Pemberton* and Mr. *Turner, contrà.*

The Master was of opinion that the Plaintiffs were not proceeding *bonâ fide* in the prosecution of this suit for the benefit of the creditors, and he therefore transferred the conduct of the suit to another creditor. There is no pretence for questioning the propriety of the order made

(*a*) 2 *Ves.* sen. 265.
(*b*) 11 *Vin. Abr.* pl. 72.
(*c*) 2 *Mer.* 482. n.
(*d*) 1 *Sim. & Stu.* 255.; and see *Lee* v. *Park*, 1 *Keen*, 714.
(*e*) *Kent* v. *Pickering*, 5 *Sim.* 569.

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v.
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made by the Vice-Chancellor; and, in the absence of all ground for impeaching it, this Court will assume that the final order, refusing protection to the executor, as well as the previous order, granting an injunction for five days only, was not made without a due regard to the merits of the case. As to the question, whether one of two executors has a right to retain his separate debt, that is one of considerable importance. The decision of Sir *John Leach* in *Nunn* v. *Barlow* cannot be supported, though it is not necessary, on the present occasion, to call upon the Court to dissent from that decision. An executor has a right to pay himself upon the principle, that he has an equal right with every other creditor to have his debt satisfied, and, if he had not a right to pay himself, he would be in a worse situation than any other creditor. But that right continues only so long as he has the administration of the assets; and from the moment that a decree of this Court is obtained against him, the right to retain must, if the principle that equality is equity is to be respected, cease. The right of retainer stands in the place of the creditor's action, in every other case except that of the executor creditor; and as no action can be brought after a decree, so neither can there be any right of retainer after a decree. There is not a single authority or *dictum* in support of the proposition, that one executor has a right to retain his own debt out of the assets come to the hands of two executors. It is clear, that he could not in any case do so without the consent of his co-executor; and, after a decree, his co-executor could not assent to such a retainer without giving a preference which would break in upon the principle of equality which governs the administration of assets in this Court.

Mr. *Barber*, in reply.

The

The MASTER *of the* ROLLS said, that as to that part of the petition, which related to the costs of the applications made to the Vice-Chancellor, he considered himself concluded by the order of the Vice-Chancellor; but upon the question of retainer, he would consider the point before he finally disposed of it.

1837.

KENT *v.* PICKERING.

The MASTER *of the* ROLLS.

Aug. 10.

In this case a balance is found due from two executors to the testator's estate. One of the executors is a creditor, and claims to be entitled to retain the amount of his debt out of the balance due from the two. The reasons on which the right of one executor to retain his own debt out of the assets of the testator in his hands, is founded, are applicable to the case in which the assets are in the hands of both, and the debt is due only to one. One executor cannot sue the other in that character: each has a right to pay or release any debt; and in this case supposing the balance to have been in the power of the two jointly, the executor who is not a creditor, could not dispose of it, without the concurrence of his co-executor the creditor; and I think that the executor and creditor had a right to refuse his concurrence to the payment of any other debt of equal rank till his own was satisfied.

In *Hopton* v. *Dryden* (*a*) the point was not determined, for although it seems to have been agreed in argument that, of two executors, one who was a creditor had a right to retain, yet in that case, the right was lost by the death of that executor leaving his co-executor surviving him, because the executor of the deceased executor might sue the surviving executor of the testator.

In

(*a*) *Pr. in Ch.* 179.

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In *Chapman* v. *Turner* (*a*) it was determined that of two administrators one could not retain against the other, but that they were to retain their debts rateably, and in *Willand* v. *Fenn*, cited in *Jacomb* v. *Harwood* (*b*), a difference between executors and administrators as to their rights and powers was negatived. Under these circumstances, I think that one executor who is a creditor of the testator, has his right of retainer out of assets consisting of a balance due from himself, and another executor jointly.

(*a*) 11 *Vin. Abr.* 72. 9 *Mod.* 268. (*b*) 2 *Ves.* sen. 265.

March 18.

ROGERS *v.* THOMAS.

A testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of *Tawleaven Row* all which might remain of her money after her lawful debts and legacies were paid:

Held, that the persons found to be inhabitants of *Tawleaven Row* were entitled to the residue of the testatrix's general personal estate.

AURELIA ROGERS made her will, dated the 9th of *September* 1832, in the following words:— 1st, I give and bequeath to all my surviving sisters, (except *Barbara* and *Caroline*,) in equal portions, share and share alike, the sum of 4000*l.* I also give and bequeath to the same sisters, all my share or shares or dues in my mine or mines. 2d, I give and bequeath to *Caroline Rawlings* the sum of 100*l.* 3d, I give and bequeath to my brother *Frederick* the sum of 200*l.*, and to each of my brothers 1*l.* each to buy a mourning ring. 4th, I do give and bequeath to Mrs. *Martyn* 100*l.* and mourning, to be given immediately after my death. 5th, I give and bequeath the sum of 40*l.* in aid of the Clothing Society at *Portleaven*. 6th, I give and bequeath the sum of 50*l.* to the Auxiliary Bible Society at *Penzance*. 7th, I give and bequeath the sum of 40*l.* to the

the *Irish Hibernian* Society. 8th, I give and bequeath to the inhabitants of *Tawleaven Row*, in the parish of *Sethney*, all which may remain of my money after my lawful debts and legacies are paid. 9th, I leave my large Bible and watch to *Francis Rogers*, and my small one to my aunt *Cecilia Bassett*. All my papers to be divided amongst my sisters. I give and bequeath *5l.* each to the servants in *York House*. I do here name and appoint as my only executors, my brother *Frederick Rogers* and *William Tweedy*, jun., authorising and requesting them to execute all the provisions of this my last will and testament; first paying all my lawful debts and funeral expenses, and next my legacies, all which shall be paid within three months after my decease.

The testatrix made three codicils to her will, by which she gave some other pecuniary legacies.

The testatrix died shortly after the date of her will; and her will was duly proved by the executors named therein.

The bill was filed by the executors against the next of kin of the testatrix, or some of them, for the purpose of having the residuary personal estate of the testatrix distributed; and by the decree at the hearing, it was referred to the Master to take the usual accounts; and to ascertain the clear residue, and of what particulars the personal estate of the testatrix consisted at the time of her death; and to inquire who were the inhabitants of *Tawleaven Row* at the time of her death, whether any of them were since dead, and, if so, who were their personal representatives; and who were the next of kin of the testatrix living at her death.

The Master, by his report, found that all the debts and legacies were paid, and that the clear residue of the testatrix's

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ROGERS v. THOMAS.

testatrix's personal estate, after payment of debts and legacies, consisted of 678*l.* 7*s.* 10*d.*, 3 per cent. reduced bank annuities, and the sum of 42*l.* 9*s.* 8*d.* in cash; and that her personal estate, at her death, consisted of 3571*l.* 8*s.* 7*d.*, 3 per cent. consolidated bank annuities, 2363*l.* 7*s.* 4*d.*, 3 per cent. reduced bank annuities; the sum of 258*l.* 2*s.* 3*d.*, cash in her banker's hands; and the sum of 57*l.* 14*s.* 7*d.* in her dwelling house, together with certain articles consisting of wearing apparel, &c. And he found that the row, called *Tawleaven Row*, consisted of seven houses, which were entirely occupied by poor fishermen and labourers, and their families; and that the inhabitants, at the time of the death of the testatrix, were the persons in his report enumerated, being thirty in number, of whom three were since dead, without leaving any personal representatives; and he also found who were the next of kin of the testatrix living at her decease.

The bill was amended by making the inhabitants so found, and such persons, not already Defendants, who were found to be some of the next of kin, parties to the suit.

Two questions were made; first, whether the gift to the inhabitants of *Tawleaven Row* was a valid gift, or void for uncertainty; secondly, whether the stock would pass under the gift of the rest of the testatrix's money.

Mr. *Sharpe*, for the Plaintiffs, submitted, that the gift to the inhabitants of *Tawleaven Row* was good, whether it was to be considered as a charitable gift, or as a gift to a class. That class having been ascertained by the Master's report, there was no uncertainty as to the objects of the testator's bounty. As to the effect of the words, "all which may remain of my money," in the residuary clause, it had been held that

stock

stock would pass under the words, "monies, goods, chattels, clothing, &c., the testator's property which might remain after paying his funeral expenses and debts;" *Kendall* v. *Kendall* (*a*); and that the words "money left," or "money left unemployed," would pass the general residue of a testator's estate, and, consequently, include stock; *Legge* v. *Argill.* (*b*) The words, "rest of my money," must have reference to the previous gift of 4000*l.*, and other pecuniary legacies; and it appeared that the testatrix was not possessed at her decease of much more than 300*l.* in money, so that there could be no doubt as to her intention.

Mr. *Bazalgette*, for the inhabitants of *Tawleaven Row*, cited *The Attorney-General* v. *Clarke* (*c*), where the testator gave the interest of 4200*l.* Bank annuities to the poor inhabitants of *St. Leonard, Shoreditch*, and it was objected that the gift was void for uncertainty; but the Court held it to be a good charitable bequest, excluding from the benefit of it such poor inhabitants as received parish relief, for otherwise, it was said, it would be giving to the rich and not to the poor. In *Dicks* v. *Lambert* (*d*) stock was held to be included under the word "securities," on the ground that, if it were not included, there would be nothing left for the legacies. In this will the word "money" could only be used in the sense of general property, out of which the residuary gift, as well as the debts and legacies of the testatrix, was to be satisfied, and must, from the state of her property, necessarily include the stock.

Mr. *Follett*, for the next of kin, contended that there was no indication, upon this will, of a charitable intent on the

(*a*) 4 *Russ.* 360.
(*b*) *Turn. & Russ.* 265. note to *Ommanney* v. *Butcher.*
(*c*) *Ambl.* 422.
(*d*) 4 *Ves.* 725.

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the part of the testatrix; and, if it was not a charitable bequest, it was altogether void, for all the inhabitants of a given street or row, without reference to age, sex, or circumstances, could not be supposed to be the objects of her particular benevolence or bounty. In *The Attorney-General* v. *Comber* (*a*), the gift was to the widows and orphans of a particular parish; and Sir *John Leach* read the gift as if it were to the poor widows and orphans, in order to support it as a charitable bequest. So in *Powell* v. *The Attorney-General* (*b*), a bequest to the widows and children of seamen belonging to the town of *Liverpool*, was held to be a good charitable bequest, and applied to the benefit of an institution for poor sailors' widows and orphans in that town. In *The Attorney-General* v. *Forster* (*c*), Lord *Eldon* said the word 'inhabitants' is capable of a larger or more limited interpretation; that it was decided in Lord *Coke*'s time that a man living in *Cornwall* might, to many purposes, be an inhabitant of *London*, that is, by having property liable to the repair of bridges, and that the construction is always to be made with reference to the nature of the subject. In *The King* v. *Hall* (*d*) Lord *Tenterden* said, "the inhabitants of any county, city, or place, either in its strict or in its popular sense, are those persons only who have their dwelling therein." Now, in this will, the word "inhabitants" was used without any qualification or restriction; there was nothing to raise any implication of charitable intention; the term would include all occupiers, and lodgers of every condition; and there was not sufficient certainty in the persons, who were to take, to give validity to the gift, as a gift to individual objects of bounty. If the testatrix intended the inhabitants at the date of her will to take, the inhabitants at the time of her death, who were the persons found by the

(*a*) 2 *Sim. & Stu.* 93.
(*b*) 3 *Mer.* 48.
(*c*) 10 *Ves.* 339.
(*d*) 1 *B. & Cress.* 136.

the Master's report, could no more take, than an after-taken wife could be entitled under a gift to the "testator's beloved wife," not mentioning her by name, which had been held to apply exclusively to the individual answering the description at the date of the will: *Garratt* v. *Niblock*. (*a*)

As to the other point, in *Gosden* v. *Dotterill* (*b*) the words were "rest of my money," which could not be distinguished from the words used by this testatrix; and Sir *John Leach*, after having reserved the point for consideration, decided that the word "money" would not pass stock, unless there was some explanatory context in the will. Here there was nothing in the will to shew that the word money was used in any other than its natural sense.

The MASTER *of the* ROLLS held, that the persons found by the Master to be the inhabitants of *Tawleaven Row*, were entitled to the residue of the testatrix's general personal estate after payment of her debts and legacies. In *Kendall* v. *Kendall* the testator bequeathed to his wife "all monies, goods, clothing, &c., my property, which may remain, after paying the charges incident to my funeral, and such debts as I may owe at my death;" and Sir *John Leach* observed, that "the mention of debts and funeral expenses afforded a strong inference that the testator considered himself as disposing of that property, which by law was subject to those charges, namely, his residuary personal estate." Here the bequest of, "all which may remain of my money," was after the testatrix's lawful debts and legacies were paid; and the inference as to her intention was at least equally strong.

(*a*) 1 *Russ. & Mylne*, 629. (*b*) 1 *Mylne & Keen*, 56.

1837.

July 22.
August 8.

DOWSON *v.* GASKOIN.

A testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of money to the five children of *E. D.*:

Held, that by the words, "whatever remains of money," the testatrix referred to her general residuary personal estate.

ELIZABETH SMITH, by her will, dated the 12th of *June* 1834, gave and bequeathed to *Mary Webb* and her brother *Martin*, 100*l.* each; and to *John Troad* and her sister *Margaret* 20*l.* each; and to *John Watier*, Mr. and Mrs. *James Christie* 20*l.* for rings; and to *George Christie* 50*l.*; and to several persons, therein named, 10*l.* each for rings; and to others 5*l.* each for rings; and to Mrs. *G. Gaskoin* and her three children 30*l.* each; and to Mrs. *S. Gaskoin* and her four children 20*l.* each; and she bequeathed to *Charlotte*, the wife of *Richard Dowson*, her niece and god-daughter, 300*l.*; and to *Elizabeth*, the wife of *John Dowson*, her niece, 200*l.*; and to *Edward Dowson* and his five children 100*l.* each: and after giving several other pecuniary legacies, and some specific legacies consisting of articles of plate, &c., she concluded her will as follows: — "I wish to be buried as my sisters were, by Mr. *Hannington*, and beg there may be two men to watch the grave for four or five nights; and I appoint Mr. *John Samuel Gaskoin* and Mr. *Thomas Revel* my executors, and bequeath 200*l.* to each for their trouble; and whatever remains of money, I bequeath to *Edward Dowson*'s five children, to be equally divided."

The testatrix died on the 30th of *August* 1834, leaving the Plaintiff, *Elizabeth Dowson*, her sole next of kin; and her will was proved by the executors named therein.

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The bill was filed by the Plaintiff, who claimed to be entitled to all that part of the testatrix's residuary personal estate which did not consist of money, against the executors and the five children of *Edward Dowson*. By the decree at the hearing, it was referred to the Master to inquire, among other things, of what particulars the personal estate of the testatrix consisted, at the time of making her will, and of her death, and to ascertain the clear residue of her personal estate. By the Master's report it appeared that, at the date of the testatrix's will, her personal estate consisted of 3157*l.* 8*s.* 6*d.* new 3½ per cent reduced bank annuities, 539*l.* 11*s.* 7*d.* cash in the *Brighton* Savings' Bank, and 350*l.* cash, together with plate, wearing apparel, &c., and that the stock and money in the Savings' Bank, with the interest accrued thereon, continued in her possession at her death. The Master found that a balance of 96*l.* 16*s.* 2*d.* cash, and the sum of 2060*l.* 9*s.* 11*d.*, new 3½ per cent. reduced bank annuities, remained unapplied; and that those sums, subject to the payment of certain legacies, as to which the executors sought the direction of the Court, constituted the clear residue of the testatrix's personal estate.

The principal question in the cause was, whether that part of the testatrix's residuary personal estate, which consisted of stock, would pass under the words "whatever remains of my money" to the five children of *Edward Dowson*, or whether it was undisposed of, and belonged to the Plaintiff as next of kin.

Mr. *Stinton*, for the Plaintiff.

The case of *Gosden* v. *Dotterill* (*a*), is precisely in point with the present case. There, as here, after bequests

(*a*) 1 *Mylne & Keen*, 56.

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bequests of pecuniary legacies, the testator gave the rest of his money to be equally divided between his brother and his niece; and Sir *John Leach*, after taking time to examine the authorities, decided that "stock," of which the testator's personal property chiefly consisted, would not pass under the word "money," in the absence of any explanatory context in the will, and that the next of kin were consequently entitled to that part of the residue which consisted of stock. The only question is, therefore, whether there is any explanatory context in this will, shewing an intention on the part of the testatrix to use the word "money," in any other than its natural and ordinary sense; and, in that respect, the present case is not distinguishable from *Gosden* v. *Dotterill*. In both cases, the gift of the rest of the money is preceded by bequests of pecuniary legacies; and there is no expression used in any part of this will, from which it can be collected that the testatrix intended her stock to pass under the word "money." In the absence of any such expression of intention, the rule of law will prevail; for no inference of intention can be drawn from the state of the testatrix's property, either at the time of making her will, or of her decease, which the Court cannot look at for the purpose of construing a will which, upon the face of it, needs no extrinsic aid to explain it.

Mr. *Stuart*, *contrà*.

If the rule, which is supposed to be inflexible, is to prevail, there can be no doubt that the intention of the testatrix will in this, as in every similar instance, be defeated; for, before making any disposition of her residuary property, she gives legacies which more than exhaust all the money, in the strict sense of that word, which was in her posssession at the time of making

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making her will, or of her decease. It is true that the Court cannot look out of a will for the purpose of finding an intention which does not primarily appear upon the face of the instrument; but it is well settled that the Court may look at extrinsic circumstances to ascertain the meaning of terms used by a testator, and that it may look at the state of the property to ascertain what is the subject of matter which the testator intended to dispose: *Lowe* v. *Lord Huntingtower* (*a*). If the whole of the testatrix's property had consisted of stock, the words "whatever remains of money," must have passed the residue of the stock to the residuary legatees; and what difference can it make, for the purpose of putting a rational construction upon the residuary clause, whether the whole of the previous dispositions of the will, or the greater part of them, must necessarily be satisfied out of the stock belonging to the testatrix. It is admitted that, if there is explanatory context, the word "money" will pass "stock:" now where the property of a testator consists of money and stock, and he gives legacies which more than exhaust his money, and makes a disposition of the rest of his money, the previous dispositions of his will are in themselves explanatory context, and shew that by the rest of his money he intended the residue of his general personal estate.

In *Legge* v. *Asgill* (*b*), Sir *John Leach* decided that the general residue of the testatrix's estate passed under the words "money left unemployed" and that decision was affirmed, upon appeal, by Lord *Eldon*. In *Kendall* v. *Kendall* (*c*), the testator gave "all monies, goods, chattels, clothing, &c. my property which may remain after paying the charges incident to my funeral and such debts as I may owe at my death," and Sir *John*

(*a*) 4 *Russ.* 532. n.
(*b*) *Turn. & Russ.* 265. n.
(*c*) 4 *Russ.* 360.

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John Leach observed that the mention of debts and funeral expenses afforded a strong inference that the testator considered himself as disposing of that property which, by law, was subject to those charges, namely, his general personal estate; and this bequest was accordingly held to pass the testator's stock. In the present case, it is to be observed that the bequest of the rest of the testatrix's money is preceded by special directions as to her funeral.

Mr. *Stinton*, in reply.

The MASTER *of the* ROLLS.

The question in this case arises upon the meaning of the words "whatever remains of money" in the last clause of the will. "Whatever remains of money" must signify a remainder at some time, or after some operation upon the sum of which the remainder is contemplated. Is it to be the sum existing at the date of the will, or the remainder of that sum or of any subsequent sum which may exist at the death of the testatrix, or after payment of her debts and legacies? There is no intimation that she intended the money (literally so called) to be first applied in payment of debts and legacies; and no reason can be given why the Court is to apply it first, or to make an apportionment for the purpose of wholly or partially defeating that which seems to be the intention of the testatrix. In the construction of wills the object of the Court is to give effect, as far as it can, to the real meaning of testators; and experience shews that the word "money" is often used in the sense of property. Even in the case of *Gosden* v. *Dotterill*, which is in many respects like the present, and in which Sir *John Leach* considered himself precluded by the authorites from giving effect to

to the intention, he nevertheless thought it right to say that he had no doubt that it was the intention of the testatrix in that case that the stock should pass under the term money.

I have looked at the several cases of *Hotham* v. *Sutton* (*a*), *Ommanney* v. *Butcher* (*b*), *Legge* v. *Asgill* (*c*), and *Kendall* v. *Kendall* (*d*), and from them it appears that, although a simple bequest of money will not of itself pass stock, yet the word "money" may be so used in a will, as from the whole context to shew that the testator meant it to pass stock and other personal estate; and that, when the intention can be clearly collected, the Court will act upon it; and, as I think, that the intention clearly appears upon this will, I must declare that, upon the true construction, the five children of *Edward Dowson* are entitled to so much of the stocks, monies, and debts as remained after payment of the funeral and testamentary expenses, debts, and legacies of the testatrix.

In the civil law, which made no distinction, except for very limited purposes, between land and personal property, the word "pecunia" comprehended every species of corporeal property: Pecuniæ verbum non solum pecuniam numeratam complectitur, verum omnem omnino pecuniam, hoc est, omnia corpora; nam corpora quoque pecuniæ appellatione contineri nemo est qui ambiget. *Dig.* lib. 50. tit. 16. l. 178. It also included incorporeal rights: Pecuniæ nomine non solum numerata pecunia, sed omnes res tam soli quam mobiles, et tam corpora quam jura continentur. *Ibid.* l. 222.

(*a*) 15 *Ves.* 319.
(*b*) *Turn. & Russ.* 260.
(*c*) *Turn. & Russ.* 265. n.
(*d*) 4 *Russ.* 360.

1837.

July 26.

SWIFT *v.* NASH.

A testator directed his real and personal estate to be sold, and the monies arising from the sale to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will. He afterwards gave an annuity to his wife by an unattested codicil:

Held, that the annuity was well charged on the real estate.

JOHN SWIFT, by his will, dated the 26th of *March* 1828, and duly attested so as to pass real estate, after directing that all his just debts and funeral and testamentary expenses should be paid out of his personal estate, and in case his personal estate should be insufficient, then out of his real estate, gave, devised, and bequeathed unto *Robert Oldershaw* and his heirs, all his freehold messuages, tenements, and hereditaments; and he gave and bequeathed unto the said *Robert Oldershaw*, his executors, administrators, and assigns, all his personal estate, and all his leasehold messuages and tenements upon trust to sell and convert into money all his personal estate, and to collect all the money which should be owing to him either on securities, or by simple contract; and as to his freehold and leasehold messuages and premises, to sell the same, as his trustee or trustees for the time being should think fit, by public auction or private contract. And it was his will, and he thereby directed, that the money to arise from such sales, and also all his ready money whatsoever, and all money to be collected and got in as aforesaid, should be held upon trust, that his said trustee or trustees for the time being should in the first place pay and apply a competent part of the same money, in satisfaction and discharge of all his just debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will, and should lay out and invest the residue of the said money as he or they should think proper. And upon further trust to pay and divide the interest, dividends, and income of the said trust monies to his two daughters, *Mary Woolnorth*, and *Anne Nash*, equally

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equally between them for their lives, for their sole and separate use, and without power of anticipation. And on the death of each of his said daughters, he directed the share of the trust monies in which that daughter was to have a life-interest to be held in trust for the child, grandchild, or other issue of such daughter, in such shares and proportions as the daughter should appoint in manner therein mentioned; and in default such appointment, in trust for all the children of such daughter equally, the sons to take vested interests when they should attain the age of twenty-one, and the daughters, when they should attain that age or marry, with limitations, in case any of the grandchildren should not live to acquire vested interests, for the benefit of the surviving grandchildren, and an ultimate limitation, in case the testator's daughters should die without issue, for his next of kin according to the statute of limitations. And the testator appointed *Robert Oldershaw* sole executor of his will.

The testator made a codicil to his will, dated the 11th of *April* 1833, which was unattested, in the following words: — "This is a codicil to the last will of me, *Joseph Swift*, bearing date the 26th day of *March* 1828. Whereas, since the execution of my said will, I have married my present wife *Mary Swift*, and in order to make some provision for her in the event of my decease before her, I do by this writing, which I declare to be a codicil to my said will, give and bequeath unto her, my said wife *Mary*, the sum of 20*l.* to be paid to her immediately after my decease, for the purpose of providing herself with mourning and other necessaries. And I direct my trustee and executor named in my said will, his executors or administrators, to pay unto her, my said wife, one annuity or yearly sum of 100*l.*, to be paid and payable to her

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quarterly for and during the term of her natural life; and I direct the first payment thereof to be made at the end of three months next after my decease. And I further direct my said trustee and executor to permit and suffer my said wife to live and reside in the dwelling-house wherein I now reside, and to have the use and enjoyment of all my household furniture, plate, linen, and china, during the term of her natural life without paying any rent for the said house, except the ground-rent, and keeping the premises in tenantable repair; and from and after her decease, then I direct the said house and premises, and my said household furniture, plate, linen, and china shall fall into the residue of my estate, and be disposed of in such manner and to the same persons as I have directed by my said will, and in all other respects I confirm my said will."

The testator died on the 23d of *February* 1834, leaving his daughters, *Mary Woolnorth* and *Anne Nash*, his co-heirs and next of kin, and the Plaintiff *Mary Swift*, his widow, surviving him. *Robert Oldershaw*, the executor named in the will, renounced probate thereof, and administration with the will annexed was granted to the testator's daughters. The personal estate was insufficient for the payment of the testator's debts and legacies, and the bill was filed by the Plaintiff against the administratrixes with their husbands, and other parties interested under the will, and against *Robert Oldershaw*, and it prayed that the will might be established and for the usual accounts of the testator's personal estate, together with an account of the arrears of the annuity due to the Plaintiff; and that the testator's freehold estates might be sold, and that out of the proceeds of such sale a sufficient sum might be set apart to secure the further payment of the Plaintiff's annuity.

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The question in the cause was, whether the annuity given to the testator's widow by the unattested codicil, was well charged on the testator's freehold estates.

Mr. *Tinney* and Mr. *Simons*, for the Plaintiff.

The testator directs his real estates to be sold, and applied, if necessary, in aid of his personal estate, and charges his debts, and also the legacies which he should give by any codicil or codicils to his will, upon the mixed fund, composed of his personal estate and the produce of the sale of his real estates. A charge of debts upon land necessarily comprehends subsequent debts, and the same principle has been extended to legacies, so that if a testator, by a will duly attested, charges his real estate generally with the payment of legacies, the charge will extend to legacies given by an unattested codicil; *Hyde* v. *Hyde* (*a*), *Masters* v. *Masters* (*b*), *Brudenell* v. *Boughton* (*c*), *Habergham* v. *Vincent* (*d*). In *Williams* v. *The Duke of Bolton* (*e*), a trust term was given by the testator to trustees to raise and pay the legacies before given, and all such legacies as the testator should give by any codicil; and the charge was held to extend to rent-charges given by an unattested codicil.

Mr. *Prescott White* and Mr. *Rogers*, *contrà*.

The cases which have decided that a general charge of legacies by a will will include legacies given by an unattested codicil, though acquiesced in, have not been approved by eminent Judges, resting, as it is said, upon no satisfactory principle. The ground upon which these

(*a*) 1 *Eq. Abr.* 409.
(*b*) 1 *P. Wms.* 421.
(*c*) 2 *Atk.* 268.
(*d*) 4 *Bro. C. C.* 353. *S. C.* 2 *Ves.* jun. 204.
(*e*) Not reported as to this point, but stated in *Habergham* v. *Vincent*, 4 *Bro. C. C.* 362. 376. 385.

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these decisions have proceeded is, that a charge of legacies being, like a charge of debts, of a fluctuating nature, is capable of future enlargement by an instrument which, being in a sense identified with the original charge, need not be attested according to the forms required by the statute. But it has never yet been held that a charge of legacies can be initiated by an unattested instrument; and accordingly an attempt to reserve by a will, duly attested, a power to charge by an instrument not duly attested, has been determined to be inoperative. *Rose* v. *Cunynghame* (*a*), *Whytall* v. *Kay* (*b*). The annuity given in the first instance by the codicil amounts in effect to an attempt to create a rent-charge by an unattested testamentary instrument. *Williams* v. *The Duke of Bolton* is not reported, and there might have been special circumstances for the decision in that case, which would render it inapplicable as an authority in support of the proposition that a rent-charge cannot be distinguished, in respect of the question now under consideration, from an ordinary legacy.

Mr. *Tinney*, in reply.

In *Rose* v. *Cunynghame*, Sir *William Grant* was of opinion that the trust was equivalent to the reservation of a power to create a future charge of legacies by an unattested instrument; and in *Whytall* v. *Kay*, the testator expressly reserved to himself such a power to appoint the whole residue arising from the sale of his real and personal estate. Here, there is no reservation of a power to charge, but a general charge of legacies to be afterwards declared; and such declaration, according to the authorities, may be made by an unattested instrument.

The

(*a*) 12 *Ves.* 29. (*b*) 2 *Mylne & Keen*, 765.

The MASTER *of the* ROLLS.

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In this case the testator, by a will duly attested, directs his real and personal estate to be converted into money, and the mixed fund arising from the conversion is to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will. By an unattested codicil he gives the annuity in question to his wife, and the question is, whether this annuity is well charged upon his real estate. I am of opinion that, by the will, there is a general charge of debts and also of legacies to be afterwards specified by any codicil; and, consequently, that this case falls within the authorities which have been cited for the Plaintiff, and not within the cases in which a power was reserved to create a future charge of legacies by an unattested codicil.

MALINS *v.* FREEMAN.

1836.
Dec. 6.
1837.
Jan. 14.

Where an estate is purchased at an auction under a mistake as to the lot put up for sale, the Court will not decree specific performance against the purchaser, but leave the vendor, if he has sustained any damage by the mistake of the purchaser, to his remedy at law.

A bill for specific performance was accordingly, under such circumstances, dismissed without costs.

THE Plaintiff, *William Malins*, being the owner of an estate, partly freehold and partly copyhold, called "*The Rookery*," and situate at *Woodford*, in the county of *Essex*, caused the same to be put up for sale by auction, in five lots, on the 8th of *May* 1834. *Richard Ellis* the elder acted as auctioneer; and among the

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the conditions of sale which were read previously to the commencement of the sale, it was stipulated that the purchaser of each lot should pay down a deposit of 20 per cent. in part of the purchase-money, and sign an agreement for the payment of the remainder of the purchase-money, with the amount of the timber, fixtures, &c. on or before the 30th of *August* 1834.

The Defendant *James Freeman* attended the sale, and was declared the highest bidder for and the purchaser of lot 3. at the sum of 1400*l.*; and, upon the lot being knocked down to him, he handed in his card to *Richard Ellis* the younger, who acted as clerk to his father, and wrote down the name and address of the Defendant on a copy of the conditions and particulars of sale. There was a reserved bidding on the other lots of the Plaintiff's estate, none of which were actually sold. A copyhold estate belonging to one *Davies* was afterwards put up for sale, but was also bought in under a reserved bidding. At the close of the auction the Defendant was called upon to pay the deposit of 20 per cent. upon the price of lot 3., and to sign an agreement for the payment of the remainder of the purchase-money in pursuance of the conditions of sale, when he declared that he had made a great mistake in bidding for lot 3. of the Plaintiff's estate, having in fact been employed only to bid up to a protecting price for *Davies*'s estate, and he refused to sign the contract or pay the deposit. The bill was filed against the Defendant for a specific performance of the agreement; it charged that the property, comprised in lot 3., consisting of a piece of land which was described and commented upon by the auctioneer at the time of the sale, differed entirely from the property of *Robert Davies*, which was put up in a single lot, and consisted of a house and grounds, and that the alleged mistake was a mere after-thought of the Defendant, set up

up by him in consequence of his having repented of his purchase. The bill further charged, that the person employed to bid up to a protecting price for *Davies*'s estate was not the Defendant, but a person of the name of *Cole*.

The Defendant, by his answer, stated that he was appointed to bid for *Davies*'s property up to a protecting price, and that having entered the auction room while lot 2. of the Plaintiff's property was in the course of sale, he supposed and believed that the next property offered for sale would be *Davies*'s, and under that impression, he bid for lot 3. of the Plaintiff's property, without any knowledge or consideration of the value thereof, and that the price at which the same was knocked down to him, was a most exorbitant and unreasonable one. That at the conclusion of the sale he explained the mistake to the auctioneer, and requested him to extricate him from the difficulty in which it had placed him. The Defendant further submitted and insisted that there was no sufficient contract in writing, within the statute, signed by the Defendant or his agent so as to be binding on the Defendant, and that there was no real bidder for lot 3., but that the Plaintiff's solicitor was the only bidder besides the Defendant, and that such solicitor acted as a puffer for the vendor, and did in fact bid several times against the Defendant, and run the lot up to an exorbitant price.

By the evidence of *Cole*, it appeared that both *Cole* and the Defendant were employed by *Davies* to bid up to a protecting price for his property, and that, in a conversation which took place between *Cole* and the Defendant, after lot 3. of the Plaintiff's property had been knocked down to the Defendant, *Cole* informed the Defendant of his mistake, and advised him to speak to

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to the auctioneer about it at once, but the Defendant declined doing so until the sale was over.

Mr. *Kindersley*, Mr. *Sidebottom*, and Mr. *Malins*, for the Plaintiff.

The Defendant resists the performance of the contract upon three grounds; first, that there was not a sufficient signing by him or his agent to render this a valid contract within the statute of frauds; secondly, that if it was a valid contract within the statute, it was entered into under a mistake, and therefore not one of which the specific performance will be enforced by this Court; thirdly, that the Plaintiff employed a puffer at the sale, by whose biddings the price at which the lot was sold to the Defendant was raised to an exorbitant price. As to the first point, *Bird* v. *Boulter* (*a*) is an express authority to shew that an entry by the auctioneer's clerk is a memorandum in writing by an agent lawfully authorised within the statute, for in the business which he performs of entering the names, &c. of the purchasers, he is impliedly authorised by the persons attending the sale to be their agent. In that case a mere nod or sign of assent by the purchaser was held to be sufficient; here the purchaser distinctly declared his assent by handing in his card. That an auctioneer is by implication an agent duly authorised to sign a contract on behalf of the highest bidder was established by previous decisions; *White* v. *Proctor* (*b*), *Kemys* v. *Proctor* (*c*); and *Bird* v. *Boulter* shews that for this purpose the auctioneer's clerk stands precisely in the place of the auctioneer. So in *Henderson* v. *Barnewall* (*d*), Mr. Baron *Hullock* observes that an auctioneer's clerk, who

(*a*) 4 *B. & Ad.* 443.
(*b*) 4 *Taunt.* 209.
(*c*) 3 *Y. & B.* 57.; and 1 *J. & W.* 350.
(*d*) 1 *Y. & J.* 389.

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who writes down the name of the buyer in his presence, is the agent of both parties. Taking this, therefore, to be a valid contract within the statute, there is, in the first place, no sufficient evidence to shew that the Defendant entered into it under a mistake, and even if the evidence on that point were doubtful, it would be too dangerous to permit a party who admits the perfect fairness and publicity of the transaction, and does not attempt to impeach the conduct of the party with whom he contracts, to resort to a defence, which is necessarily open to great suspicion, and which, if true, seeks to rescind a contract upon no other ground than the Defendant's own gross negligence. Obtuseness or carelessness may be so dense or gross as in itself to amount to a species of legal fraud, and at any rate will receive no encouragement from a court of law or equity. The Defendant cannot be permitted to set up his own *crassa negligentia*, as a reason why the Court should relieve him from his liability. Admitting that the Defendant was employed as a puffer for *Davies*'s estate, that does not negative the fact of his having purchased, on his own account, lot 3. of the Plaintiff's property, and purchased it with a full knowledge of its nature and value; for he was close to the auctioneer, heard it described and commented upon, and also, before he handed in his card, heard the auctioneer declare that the lot was absolutely sold, thereby distinguishing the lot sold to a purchaser from those which were bought in. The Court has repeatedly decreed specific performance against purchasers of estates at auctions, *Oldfield* v. *Round* (*a*), *Kemys* v. *Proctor* (*b*); and in no instance has it relieved a purchaser at an auction on the ground of alleged mistake. As to the third ground of defence, it is admitted, on the part of the Plaintiff, that he employed a person to

(*a*) 5 *Ves.* 508. (*b*) 3 *V. & B.* 57.; and 1 *J. & W.* 350.

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to bid up to a price which should protect the estate from being sold below its fair value. This he had a right to do, and the exercise of a right, for which there is indeed the express sanction of an act of parliament (*a*), will be no objection to a specific performance against a purchaser at the sale; *Bramley* v. *Alt* (*b*), *Conolly* v. *Parsons* (*c*), *Smith* v. *Clarke*. (*d*)

Mr. *Pemberton* and Mr. *Rogers*.

The first point to be made out on the part of the Plaintiff is, that this was an agreement in writing within the statute of frauds, and there is strong ground for contending that a memorandum made by the clerk of an agent cannot constitute such an agreement. The case of an auctioneer stands, no doubt, upon special circumstances which take it out of the general rule; but it is a case of exception which has gone far enough, and ought not, without necessity, to be extended. In all other cases the principle of *delegatus non potest delegare*, would apply, and there is no just reason why a further incroachment upon the statute of frauds should be made by holding that it is not to apply to the case of an auctioneer. In *Blore* v. *Sutton* (*e*), Sir *William Grant* held that a memorandum in writing entered in the book of an authorised agent, signed not by the agent himself, but by his clerk, was not a sufficient agreement within the statute. The cases have settled that an auctioneer must be considered as the agent both for the vendor and purchaser; but the question is, whether the auctioneer, who is the delegate of both parties, can himself delegate his authority. *Bird* v. *Boulter* has not gone the length of establishing the exception

(*a*) 42 *G.* 3. *c.* 93. *s.* 1.
(*b*) 3 *Ves.* 620.
(*c*) *Ibid.* n. 625.
(*d*) 12 *Ves.* 477.
(*e*) 3 *Mer.* 237.

ception contended for, and in general the clerks of agents have no authority to bind the principal, *Coles* v. *Trecothick.* (*a*) Upon the evidence there can be no reasonable doubt that the Defendant attended the sale for the sole purpose of bidding up to a protecting price for *Davies*'s estate, and that he bid for and became the purchaser of lot 3. of the Plaintiff's property under a mistake. Will the Court, then, permit the Plaintiff to take advantage of that mistake, by compelling the Defendant to pay an exorbitant price for property which he never intended to purchase? If the Plaintiff has sustained any damage by the mistake of the Defendant, he has his remedy at law, and to that remedy the Court will leave him.

It is true that a vendor may employ a person to bid up to a protecting price at an auction, in order to prevent his property from being sold at an under value, but he must give notice that there is such a person bidding for him; and if he employs a puffer, not for the purpose of protecting his property against an undersale, but for the purpose of enhancing the value, the act is fraudulent, and the sale cannot be enforced against a purchaser, *Crowder* v. *Austin.* (*b*) There are cases in which the employment of a single puffer vitiates the sale, as where goods are sold under an extent, *The King* v. *March* (*c*); and in a case at *Nisi Prius*, Lord *Tenterden* declared it to be the strong inclination of his opinion that, if only one person be employed to bid with a view to save the auction duty, the sale is void, unless it be announced that there is a person bidding for the owner; for the act itself was fraudulent; *Wheeler* v. *Collier.* (*d*) In the present case there

(*a*) 9 *Ves.* 234.
(*b*) 3 *Bing.* 368.; and 11 *Moore*, 283.
(*c*) 3 *Y. & J.* 331.
(*d*) *Mood. & Malk.* 173.

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there was in fact no bidder at the sale except the puffer, and the Defendant who bid under a mistake, and it is admitted that all the other lots were bought in by the puffer. Is this a case in which the Court ought to exercise its discretionary power by decreeing specific performance in aid of a party who has employed a puffer to enhance the price of his property, and against a party who has, under a mistake, purchased the property (supposing it to have been purchased, which we deny), at a price so fraudulently enhanced.

Mr. *Kindersley*, in reply.

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The MASTER *of the* ROLLS.

The Plaintiff being entitled to an estate called the *Rookery*, at *Woodford* in *Essex*, employed *Richard Ellis* and son as auctioneers to sell the same by auction in five lots on the 8th day of *May* 1834; and the same auctioneers were employed by a Mr. *Davies* to sell for him an estate at *Layton* on the same day and at the same place, *Garraway*'s Coffee-House.

The Defendant *Freeman*, who was acquainted with *Davies*, met *Davies* on the day preceding the sale, and offered to go and bid for him. *Davies* having accepted his offer, a meeting between them was appointed to take place at the auctioneer's on the day of sale at twelve o'clock. The object of *Davies* in appointing this meeting was, that the Defendant should receive his instructions from the auctioneer; but the Defendant not having kept his appointment, joined *Davies* at *Lloyd*'s Coffee-House between one and two o'clock, and was in a hurry to proceed to the sale, fearing that he might be too late to bid for *Davies*'s estate. *Davies* gave him his

his own instructions, and the Defendant hurried away to *Garraway*'s Coffee-House.

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The auctioneer's arrangement was to sell the several lots of the Plaintiff's estate first, and then to sell *Davies*'s estate, and it appeared that the Defendant arrived at the auction room when the second lot of the Plaintiff's estate was under sale. He placed himself near enough to the auctioneer, for a person not deficient in hearing to hear what the auctioneer said. Lot 2. of the Plaintiff's estate was bought in; and the auctioneer, having described lot 3. in terms wholly inapplicable to *Davies*'s estate, offered that lot for sale. The Defendant began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to 1400*l.* The lot was then knocked to him, and the auctioneer declared the property to be absolutely sold. The Defendant was not at that moment called upon to sign the contract, but he handed in his card, shewing his name as purchaser. About the same time, Mr. *Cole*, another person employed by Mr. *Davies* to bid for him, asked the Defendant what had induced him to purchase the lot, to which he observed, "Why it is *Davies*'s property, is it not?" Mr. *Cole* having told him that it was not, but that he had bought part of *Malins*'s property at *Woodford*, the Defendant seemed much flurried, and said he would speak to the auctioneer. *Cole* advised him to do so at once, but he said he would wait till the sale was over; and, after the sale was over, being called upon to pay the deposit and sign the contract, he said he had made a great mistake in bidding for lot 3. of the Plaintiff's estate, having in fact only intended to bid for *Davies*, and he refused to sign the contract or pay the deposit.

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The auctioneer wrote the Defendant's name, as purchaser, on a copy of the conditions and particulars of sale, in such a manner as the Plaintiff alleges is sufficient to make the contract binding on the Defendant; and therefore he insists that he is entitled to a specific performance of the agreement.

Upon the facts proved, some questions are raised as to the validity of the contract; but supposing the contract to be valid, the Defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it.

Certainly if the Defendant did fall into any mistake, it cannot be ascribed to the conduct of the Plaintiff. The Plaintiff and his agents in no respect contributed to it, and, if the Defendant by his carelessness has caused any injury or loss to the Plaintiff, he is accountable for it.

But the Defendant may be answerable for damages at law without being liable to a specific performance in this Court. In cases of specific performance the Court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the Plaintiff, yet, if the agreement was made in a state of intoxication, the Court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the Court will relieve, for the Court is not here called upon to relieve the Defendant from his legal liability, but whether, if the mistake be proved, the Court will enforce a specific

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specific performance, leaving the Defendant to his legal liability. And I think that, if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the Defendant never did intend to bid for this estate. He was hurried and inconsiderate, and, when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he occasioned some loss to the Plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law. Let the bill, therefore, be dismissed without costs.

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1836. *Nov.* 24.
1837. *Jan.* 13.

A PETITION was presented by *Charles Corfield*, praying that the Master's report, by which he found that the petitioner's incumbrance was entitled to priority over the incumbrance in the petition mentioned, might be confirmed.

A., one of several executors, who alone acted, took an assignment of his son's interest in the residuary estate of the testator, as a security for advances made by *A.* to his son, without giving notice of the assignment to his co-executors. After the death of *A.* and the institution of a suit by a surviving executor for the administration of the testator's estate, the son assigned the same interest, without notice of the prior assignment, for valuable consideration to *B.*, who gave notice of his assignment to the surviving executor:

Held, that the knowledge which one of several executors has of an assignment made to himself by a legatee is not sufficient to prevail against a subsequent assignee of the same interest who gives notice to a surviving executor, and that the assignment to *B.* was consequently entitled to priority.

A cross-

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A cross-petition was at the same time presented by *Thomas Bacon* and *Thomas Walford*, the surviving trustees for *Anthony Bacon*, the elder, praying that the Master's report, by which he found that the incumbrance of *Charles Corfield* was entitled to priority over the incumbrance of the petitioners on the share of the Defendant *Anthony Bacon* the younger in the residuary estate of the testator *Richard Ramsbottom*, might not be confirmed; but that it might be declared that the petitioners were entitled to receive the sum of 4000*l.*, which had been set apart to answer the share of *Anthony Bacon* the younger, in priority to *Charles Corfield*.

The testator, *Richard Ramsbottom*, died in the year 1813, having, by his will, bequeathed his residuary estate to *John Ramsbottom*, *Anthony Bacon* the elder, *Henry Thomas Timson*, and *Nicholas Bacon Harrison*, in trust for the children of his daughter Mrs. *Bacon*, one of whom was the Defendant *Anthony Bacon* the younger, and appointed the three first-mentioned trustees, together with *John Ramsbottom* the younger, his executors. *Anthony Bacon* the elder appeared to have been the only acting executor, and in the year 1819, *Anthony Bacon* the younger, being in difficulties, applied to his father, who consented to advance sums of money to him to the extent of 5000*l.*, upon the son executing an assignment of his interest in the residuary estate of the testator; and by a deed, dated the 6th of *February* 1819, reciting that *Anthony Bacon*, the younger, had attained his age of twenty-one years, and had already received the sum of 5000*l.* from the executors of the testator in part payment of his share of the residue, and that *Anthony Bacon* the elder had, at different times, advanced to his son various sums which, with the further sums he was about to advance, would amount to the sum of 5000*l.*; and that *Anthony Bacon*, the

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the younger, to secure the payment of the 5000*l.* so advanced, and to be advanced, had proposed and agreed to execute the assignment thereinafter mentioned, it was witnessed that *Anthony Bacon*, the younger, assigned to *Thomas Bacon*, *Robert Langford*, (since deceased), and *Thomas Walford*, their executors, &c., all his share of the residuary personal estate of the testator *Richard Ramsbottom*, upon trust in the first place to pay to *Anthony Bacon* the elder, his executors, &c., the said sum of 5000*l.* and interest, and after payment thereof, as to the residue, in trust for *Anthony Bacon*, the younger.

Anthony Bacon, the elder, died in the year 1827, and the bill was filed, in the year 1828, by *Henry Thomas Timson*, one of the surviving executors, for the administration of the testator's personal estate. The usual decree for taking the accounts was made on the 11th of *February* 1830, and the residue of the testator's estate was paid into Court.

In the year 1832, *Anthony Bacon*, the younger, applied to *Charles Corfield* to advance to him the sum of 1000*l.*, on the security of his interest in the residuary estate of the testator, and by an indenture dated the 13th of *March* 1832, between *Anthony Bacon*, the younger, of the one part, and *Charles Corfield* of the other part, it was witnessed that in consideration of 1000*l.* paid by *Corfield* to *Anthony Bacon*, the younger, *Anthony Bacon*, the younger, assigned to *Corfield*, his executors, &c., all that part, share, and proportion of him, *Anthony Bacon*, the younger, to which he was entitled in the residuary estate of *Richard Ramsbottom*, upon trust that *Corfield*, his executors, &c., should, in the first place, out of the said share, pay himself the said sum of 1000*l.* and interest, together with costs and charges, and after satis-

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faction thereof, should pay the remainder of such share to *Anthony Bacon*, the younger, his executors, &c. And *Anthony Bacon*, the younger, did thereby covenant and declare with *Corfield*, his executors, &c., that, at the time of the execution of the said indenture, he, *Anthony Bacon*, the younger, was lawfully and rightfully entitled to the said part or share of and in the said residuary estate, and that he had not at any time theretofore released, charged, or incumbered or otherwise prejudicially affected the same, or any part thereof, in any manner howsoever, or made or done, or been party or privy to any act, deed, matter or thing whatsoever, whereby *Corfield*, his executors, &c. should or might be prevented, hindered, or delayed, in recovering or receiving the same, but then had in himself full and absolute right and title to bargain, sell, assign, transfer, and set over the same unto *Corfield*, his executors, &c., in the manner therein mentioned, and according to the true intent and meaning of the said indenture. And the deed contained a power of attorney to *Corfield*, to receive the share of *Anthony Bacon*, the younger, from the Accountant-General, or from the executors, and also a covenant for further assurance.

On the 9th of *May* 1832, *William Corfield*, as solicitor for *Charles Corfield*, gave notice of this assignment to the Plaintiff's solicitor.

By an indenture, dated the 11th of *May* 1832, *Anthony Bacon*, the younger, assigned all his interest in the same property to his brother *Charles Bacon*.

The trustees for *Anthony Bacon* the elder, and *Charles Corfield*, both presented petitions on the same day for restraining payment of the fund.

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Petitions were afterwards presented by each incumbrancer for satisfaction of his security out of the share of *Anthony Bacon*, the younger, and the sum of 4000*l.* was ordered to be set apart to answer this share, and it was referred to the Master to ascertain the priorities.

A state of facts was carried in before the Master by the trustees for *Anthony Bacon*, the elder, and supported by several affidavits, among which was an affidavit by *Anthony Bacon*, the younger, to the effect, that in the month of *March* 1832, having occasion for a loan of money, he applied to *William Corfield*, who was then his solicitor, to procure for him the sum of 1000*l.*, and that at the time of making such application, he told *William Corfield* that he was willing to secure the repayment of such sum by assigning his share in the residuary estate of *William Ramsbottom*, subject, nevertheless, to the previous assignment of such interest by the deed of the 6th of *February* 1819, which he had executed to the trustees for *Anthony Bacon* the elder. The affidavit further stated, that *William Corfield* informed the deponent that *Charles Corfield* was willing to advance the 1000*l.* upon such security; that the deponent verily believed that at the time *Charles Corfield* agreed to advance such sum, he was aware of the assignment to the trustees of *Anthony Bacon* the elder; that the deponent had not received from *Charles Corfield* the full sum of 1000*l.*, but only 510*l.*, the remaining sum of 490*l.* having been retained by *William Corfield* for his costs, and that the deponent had been informed and believed that *William Corfield*, in the transaction between *Charles Corfield* and the deponent, acted as the solicitor of *Charles Corfield*.

This affidavit the Master refused to receive as evidence, on the ground that the deponent could not be

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permitted to contradict the declarations contained in his own deed, and also on the ground that he had an interest in the claim which the affidavit went to support.

The affidavit of *William Corfield* stated that, at the time and previously to the date and execution of the indenture of assignment to *Charles Corfield*, *Anthony Bacon*, the younger, solemnly assured the deponent that there was no incumbrance whatsoever upon the property assigned, but that he (*Anthony Bacon*, the younger,) was to share equally with his brothers and sisters in the residue of *Richard Ramsbottom*'s property. And *Charles Corfield*, by his affidavit, stated that neither at the time of making the advance, nor at any time previously thereto, had he been informed or had any reason to believe that *Anthony Bacon*, the younger, had charged, or executed any other or previous incumbrance on his share and interest; and that the deponent was induced to make the advance on the full faith and reliance that the assignment executed to him was the only charge or incumbrance on such share and interest.

It was agreed between *Charles Corfield* and the trustees for *Anthony Bacon*, the elder, that the question as to the priority of their respective incumbrances should be settled by petitions, instead of taking exceptions to the Master's report.

On these petitions several questions were raised; first, whether *Charles Corfield* had given sufficient notice of his incumbrance; secondly, supposing him to have given sufficient notice, whether constructive notice of the prior assignment had been sufficiently denied; thirdly, whether the affidavit of *Anthony Bacon*, the younger, was or was not admissible evidence of such constructive notice; and, lastly, whether the assignment

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to *Anthony Bacon*, the elder, who was himself one of the legal holders of the fund, without any communication of the transaction by *Anthony Bacon*, the elder, to his co-executors, was sufficient to give priority to his security over a subsequent assignment, accompanied with notice by the assignee to the surviving executor.

In support of the cross-petition, it was contended that the giving of notice to the legal holder of a fund by a subsequent incumbrancer was not sufficient to postpone a prior incumbrancer who had not given notice, unless it was preceded by inquiries of the legal holder. In *Dearle* v. *Hall* (*a*), where a prior incumbrancer was postponed to a subsequent incumbrancer who gave notice to the trustees of the fund, that subsequent incumbrancer made inquiry of the trustees as to the vendor's title and the amount of his interest, and received no intimation of the existence of any prior incumbrance; and Sir *Thomas Plumer*, in his judgment, relied upon that circumstance as an essential ingredient in constituting the due diligence upon which alone the claim of a subsequent incumbrancer to priority could be founded. Inquiry was of the very essence of that due diligence, and notice of the completion of a purchase without inquiry was insufficient to postpone a prior incumbrancer. Inquiry of the trustee as to the existence of any prior incumbrance should first be made, and, if such inquiry is satisfactorily answered, the purchaser should give notice to the trustee of his having completed his purchase. In the recent case of *Smith* v. *Smith* (*b*), where notice of an assignment was given to one of two trustees, Lord *Lyndhurst* said, "A second assignee, in order to have obtained a priority, must have shewn that he had exercised proper precaution in taking the

(*a*) 3 *Russ.* 1. (*b*) 2 *Crompt. & Mees.* 232.

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the assignment; that he had applied to the trustees to know if any previous assignment had been made; and, unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done."

The principle upon which the cases of *Dearle* v. *Hall* (*a*), and *Loveridge* v. *Cooper* (*b*) were decided, could scarcely be considered as finally settled. It was a principle which Sir *Thomas Plumer* had himself declared to be inconsistent with the doctrine of this Court in *Cooper* v. *Fynmore* (*c*), where he said that mere neglect of notice was not sufficient to postpone a prior incumbrancer, and that in order to deprive him of his priority it was necessary that there should be such *laches* as, in a court of equity, amounted to fraud. It was a principle which certainly would not have been acquiesced in by Lord *Eldon*, who, in *Evans* v. *Bicknell* (*d*), where a mortgagee parted with the title deeds, and enabled the person to whom he delivered them to commit a fraud upon the purchaser, said that "the mere circumstance of parting with title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself sufficient to postpone the first mortgagee." And in *Martinez* v. *Cooper* (*e*), Lord *Eldon*, after an interval of twenty-five years, expressed his adherence to the doctrine laid down in *Evans* v. *Bicknell*, and said, "that was an important case, because it tended to lay down a rule among the fluctuating decisions that had been made before that time; and that he

(*a*) 3 *Russ.* 1.
(*b*) 3 *Russ.* 30.
(*c*) 3 *Russ.* 60.
(*d*) 6 *Ves.* 190.
(*e*) 2 *Russ.* 216.

he there took great pains to settle the principle on which this Court ought to proceed in such questions."

Even if *Corfield*'s notice was sufficient, it appeared by the affidavit of *Anthony Bacon*, the younger, which was improperly rejected by the Master, that *William Corfield*, who was the solicitor of both parties in the transaction, had notice of the prior incumbrance, and notice to the solicitor was notice to the client. In the affidavit of *William Corfield* there was no distinct denial that he knew of the previous assignment at the time when the 1000*l.* was advanced by *Charles Corfield*. The alleged inconsistency of the deed with the statement in the affidavit of *Anthony Bacon*, the younger, was not a sufficient ground for rejecting his evidence, and as to the objection on the ground of interest, *Anthony Bacon*, the younger, had assigned all his interest in the subject of dispute to his brother.

The fund was in Court at the period of the subsequent assignment, and nothing but an order of the Court first obtained by the subsequent incumbrancer, could postpone the prior incumbrancer; *Greening* v. *Beckford*. (*a*) Now the subsequent incumbrancer had not obtained the advantage which could alone support his claim to priority, for each incumbrancer obtained an order restraining payment of the fund on the same day. Notice to an executor, after a decree in an administration suit, was inoperative, for the Court had the exclusive administration of the assets, and the executor was not at liberty to do any act which affected the relative rights of creditors; *Shewen* v. *Vanderhorst*. (*b*)

Lastly,

(*a*) 5 *Sim.* 195. (*b*) 2 *Russ & Mylne*, 75.

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Lastly, the circumstance of *Anthony Bacon*, the elder, uniting the characters of executor and assignee was of itself sufficient to support the priority of his incumbrance. He was, in fact, the sole acting executor, and might naturally enough consider it nugatory to give notice of his incumbrance to his co-executors, who took no part in the execution of the trusts of the will. Had he been the sole executor and trustee, it would have been impossible to give notice of his incumbrance to any other legal holder of the fund, and notice to him of a subsequent incumbrance having been actually created could not possibly have benefited the subsequent incumbrancer giving such notice; a circumstance which strongly supports the argument founded on the insufficiency of notice of an incumbrance actually completed without previous inquiry as to the existence of any prior incumbrance. It had been decided, as between a first and second incumbrancer, that notice by the first incumbrancer to one of several executors or trustees was sufficient; *Smith* v. *Smith* (*a*); and where an executor or trustee happened to be himself the incumbrancer, his knowledge was equivalent to, and superseded the necessity of, notice to any other executor or trustee. In *The matter of Raikes* (*b*), a case in bankruptcy, the bankrupt, being one of the directors of a life assurance office, deposited a policy of that office with his bankers as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office, and this was held to be sufficient notice to the company of the transfer of the bankrupt's interest in the policy. *Ex parte Vauxhall Bridge Company* (*c*) was an authority to the same effect.

On

(*a*) 2 *Crompt. & Mees.* 232.
(*b*) 4 *Deac. & Chitt.* 412.
(*c*) 1 *Glyn. & Ja.* 106.

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On the other side it was insisted that there was no ground for the objection that *Corfield*'s notice of his incumbrance was not preceded by inquiry as to the existence of any prior incumbrance, for such inquiry was not necessary. There was no such inquiry in *Loveridge* v. *Cooper*, and yet, notwithstanding that difference in the circumstances between *Loveridge* v. *Cooper*, and *Dearle* v. *Hall*, Lord *Lyndhurst* was of opinion that the principle was the same in both cases, and that the decision in one must follow the decision in the other. Lord *Lyndhurst*'s decisions in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* proceeded upon the ground of notice only, without any reference to the ground of inquiry from the trustees, which was supposed on the other side to be a necessary preliminary to the service of notice upon the trustees. In *Foster* v. *Blackstone* (*a*), the want of inquiry in addition to notice, and consequently, as it was contended, the absence of that diligence which was necessary to give priority to a subsequent incumbrancer, was strongly insisted upon both in the argument at the Rolls, and upon the appeal before the House of Lords, and yet the decision of Sir *John Leach* was affirmed. As to the affidavit of *Anthony Bacon* the younger, even if the Court should be of opinion that the Master was wrong in refusing to receive it as evidence, it was evidence only to the extent of its value, and its value must depend upon a comparison of the declarations contained in it with the solemn deed executed by the deponent, in which there was no recital or mention whatsoever of any previous assignment. Could there be any circumstance more strongly confirmatory of the affidavit of *William Corfield*, which it was attempted to impeach? The principle, upon which *Dearle* v. *Hall* and *Loveridge* v. *Cooper* were decided, had been

(*a*) 1 *Mylne & Keen*, 297.

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been fully considered in those cases, and was now too firmly settled to be shaken by any conflicting decision, which had been pronounced before the principle had been subjected to so thorough an investigation.

The case of *Greening* v. *Beckford* went only to shew, that the incumbrancer, who first obtained an order from the Court to restrain the transfer of his security, obtained the priority: here both incumbrancers obtained orders on the same day; and, so far as their equities in that respect were concerned, they stood precisely upon the same footing. As to the argument that the knowledge which *Anthony Bacon*, the elder, possessed of his own incumbrance, was the knowledge of all the other executors, and sufficient notice to have the effect of excluding subsequent incumbrancers, it was fallacious and untenable. The union of the two characters of executor and assignee in *Anthony Bacon*, the elder, instead of superseding the necessity of communicating to his co-executors the fact of his having taken an assignment, rendered such communication the more necessary. The principle, upon which notice of an incumbrance was held to give an advantage over priority in point of time, was this; that it had the effect of preventing a fraudulent dealing with the subject of the incumbrance, and that the prior incumbrancer, who had omitted to give such notice, was precluded by his own *laches* from claiming the benefit of his security. But what equity had one of several executors, who concealed or omitted to give notice of his own incumbrance to his co-executors, and thereby permitted a fraud to be practised upon a subsequent incumbrancer, to claim priority over that incumbrancer, who took the precaution which the prior incumbrancer had neglected? It was not necessary, in the present case, to consider what would be the equities between a single executor or trustee, who took an

an equitable assignment, and a subsequent assignee who gave notice of his assignment to the executor or trustee, because in such case the knowledge of the sole executor or trustee must *ex necessitate rei* be all the notice which could be given of his own assignment, and no want of diligence could be imputed to him. But, in the present case, the necessity which might render the diligence of the subsequent incumbrancer unavailing in the case supposed, did not exist; there were other legal owners of the fund, and the union of the two characters of executor and assignee was not so complete, but that he might, by communicating to his co-executors the fact of his having taken a security, have prevented that subsequent fraudulent assignment, which was occasioned by his omitting to take that necessary precaution. Even supposing that the knowledge of an executor or trustee, who took an incumbrance, was equivalent to notice to an executor or trustee who was not also an incumbrancer, which was putting the proposition contended for on the other side as high as it could possibly be maintained, the authorities did not support the argument that notice to one of several executors or trustees was sufficient. In *Dearle* v. *Hall*, notice was given to all the trustees; in *Loveridge* v. *Cooper*, notice was given to the only surviving trustee, and in *Foster* v. *Blackstone*, notice was given to all the trustees through the medium of their solicitors.

Mr. *Pemberton*, and Mr. *Lovat*, for the petitioner, *Charles Corfield*.

Mr. *Barber*, Mr. *Kindersley*, and Mr. *Walford*, in support of the cross-petition.

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The MASTER *of the* ROLLS.

In 1819, *Anthony Bacon*, the elder, was one of the executors of the testator *Richard Ramsbottom*, and is said to have had the sole management of the testator's affairs. *Anthony Bacon*, the younger, having attained twenty-one years of age, was entitled to a certain share of the testator's residuary estate, and being in want of money, his father made him some advances, and agreed to make those advances up to 5000*l.*, on having an assignment of his son's interest in the testator's estate; and thereupon by indenture, dated the 6th day of *February* 1819, and made between *Anthony Bacon*, the younger, of the one part, and *Thomas Bacon*, *Robert Langford*, and *Thomas Walford* of the other part, *Anthony Bacon*, the younger, assigned his share of, and interest in the testator's estate to *Thomas Bacon*, *Robert Langford*, and *Thomas Walford*, on trust to receive the same, and thereout repay the 5000*l.*, with interest at 5 per cent. to *Anthony Bacon*, the elder, and in trust, as to the residue, after such payment for *Anthony Bacon*, the younger.

In the year 1821, the advances of the father amounted to the full sum of 5000*l.*, and thereby he completed the consideration for which the deed was executed; but it does not appear that he ever communicated this transaction to his co-executors; and upon this the question arises, whether the knowledge which one of several executors has of an assignment executed to himself by a legatee is notice which will give validity to the assignment to the prejudice of a subsequent assignee.

Anthony Bacon, the elder, died in the year 1827, and in the following year, *Henry Thomas Timson*, a surviving executor, filed a bill for the administration of the estate

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estate in this court. A decree was made in 1830, and in 1831 the residue of the testator's estate was brought into court.

After this, *Anthony Bacon*, the younger, executed a deed dated the 13th of *March* 1832, and made between himself of the one part, and *Charles Corfield* of the other part, and thereby assigned his share of and interest in the testator's estate to *Charles Corfield*, on trust to retain and pay 1000*l.* lent by him to *Anthony Bacon*, the younger, together with interest and costs, and on trust, as to the residue, to pay the same to *Anthony Bacon*, the younger.

Of this assignment notice was given to the executor Mr. *Timson* on the 9th day of *May*, and upon the validity of this notice two questions are raised. It is said the notice was invalid; first, because it was not accompanied by any inquiry as to prior incumbrances; and, secondly, because the fund being in court, an application ought to have been made for an order to prevent the fund being paid out without notice to the assignee.

The first reason, alleged for the invalidity of the notice, is answered by the case of *Foster* v. *Blackstone*, which was affirmed in the House of Lords, and in which the like argument was used without effect.

The second reason might have been of weight, if the executors of *Anthony Bacon*, the elder, had obtained an order before *Corfield;* but as both parties afterwards obtained an order on the same day, there is no competition in that respect; and, neither party having any advantage in respect of the order, I think that notice to the executor must be considered good. If no

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order had been obtained by either party, it would have been the duty of the executor, and it is indeed the constant practice of executors to inform the Court of any incumbrances before an order is made for the distribution of the fund.

But the notice, to the executor of *Ramsbottom*, of Mr. *Corfield*'s assignment would be of no avail, if, at the time when his assignment was taken, Mr. *Corfield* had notice of the prior assignment, made by *Anthony Bacon*, the younger, to his father; and the next question raised is, whether Mr. *Corfield* had such notice. In such a case it appears to me that the *onus probandi* is on the party who charges notice. There is no attempt to prove direct notice, and that is distinctly denied; and the only doubt on the subject is, whether *Charles Corfield* had constructive notice through the medium of *William Corfield*, his solicitor.

Mr. *William Corfield* has not in terms denied notice. His affidavit is to the effect that, at the time of the indenture, *Anthony Bacon*, the younger, told him that there was no incumbrance on the property, and that he was to share with his brothers and sisters in the division to be made of *Ramsbottom*'s estate.

This does not meet the charge of notice in distinct terms; but it is inconsistent with the supposition that, at the same time, Mr. *Anthony Bacon* (from whom alone the knowledge of the prior assignment was to come) informed *William Corfield* that his share of *Ramsbottom*'s estate was subject to a prior incumbrance, so large as that which really existed; and it is entirely consistent with the inference to be drawn from the deed itself, by which Mr. *Anthony Bacon* covenanted and declared that he was rightfully entitled to his share of the estate, and had

had not charged or incumbered the same or any part thereof in any manner whereby *Charles Corfield* might be hindered from receiving the same, but then had full right to assign the same.

To meet the inference deducible from the deed and from the affidavit of *William Corfield*, the executors of *Anthony Bacon*, the father, have tendered an affidavit of *Anthony Bacon*, the son, in which he states that *William Corfield* was his solicitor, and employed by him to borrow 1000*l.*, the repayment of which he told *William Corfield* he was willing to secure by assigning to the lender his share of *Ramsbottom*'s estate, subject to the previous assignment of the 6th of *February* 1819, which was to secure 5000*l.* actually advanced by his father to him, or for his use. The affidavit has other statements, to the effect that the deponent believed *Charles Corfield* had notice of the prior assignment; that part of the money was applied in satisfying *William Corfield*'s costs, and other claims; and that, in the year 1827, *William Corfield* was aware of the prior assignment when he stated that it was of no validity. But as these statements would not (even if the reception of the affidavit were free from objection) afford evidence to fix *Charles Corfield* with notice at the time of the assignment, I shall not notice them further.

The statement that, in the transaction itself, Mr. *Bacon* told *William Corfield*, the solicitor of the vendor, that the assignment intended as a security was to be subject to a prior charge, is undoubtedly material, and makes it necessary to consider whether the affidavit ought to be received; or, if received, what weight is due to it under the circumstances.

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The reception is objected to on two grounds; first, because it is produced to contradict the declarations of the same person contained in his solemn deed; secondly, because it is produced to support a claim of the executors of *Anthony Bacon*, the elder, in whose estate the deponent is interested.

I am of opinion that the first objection cannot be supported, however the weight of the testimony may be affected. A man may be examined as a witness to contradict declarations of his own in a deed which he has executed. And as to the second objection, it appears that the deponent has, by an assignment made to his brother *Charles*, ceased to have any interest in his father's estate. Supposing this to be correct, I am obliged to compare this affidavit with the affidavit of *William Corfield*, and the effect of the deed; and the result of my consideration of this evidence is, that Mr. *Charles Corfield* is not fixed with constructive notice of the prior assignment.

What remains, therefore, is to consider whether there was sufficient notice of the assignment of the 6th of *February* 1819, and I regret to say that none of the authorities referred to appear to me to afford a guide. In *Dearle* v. *Hall* the fund was invested in the names of trustees, and notice was given to all. In *Loveridge* v. *Cooper* the fund was invested in the names of trustees, and notice was given to the only survivor. In *Foster* v. *Blackstone* the incumbrance was charged on a life interest in real estate, vested in trustees; and notice to their solicitors was held good notice to them. In *Smith* v. *Smith* the incumbrance was on a life interest in funds and real estates, vested in trustees; and notice to one of the trustees was held sufficient. In that case there might

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might be circumstances to induce the Court to presume that the trustee who had notice communicated his knowledge to his co-trustees. But none of the cases cited, nor the cases in bankruptcy which were referred to, appear to me to be like the present. A father and son having a transaction of this sort between themselves, the father being one of several executors — no allegation even that the other executors were informed before the notice received from *Corfield* — no ground whatever to presume that the transaction was communicated to the other executors, each one of whom had separate authority to receive and pay on account of the estate, and who, if they had no notice of the assignment, might have made payment to the assignor without incurring any liability on that account.

I think, after a good deal of hesitation, that the knowledge of one of several executors who was interested, and does not appear to have communicated his knowledge to his co-executors, is not sufficient. It is a case in which the assignee has done nothing but accept the assignment; and it appears to me that the Master's report must be confirmed and the cross-petition dismissed.

This decision was appealed from, and the case was opened before the Lord Chancellor; but, before its conclusion, the parties came to a compromise, and the appellants consented to be bound by the decision of the Master of the Rolls.

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April 16.

COOKE *v.* BOWLER.

A testator gave the dividends of stock to his brother and three sisters, and after the decease of either of them, leaving any children, the share of him or them so dying, to such children, for their lives, with benefit of survivorship; and in case either of his brother and sisters should die without leaving such issue, then the survivor or survivors to take the dividends; and after the decease of the survivor of the children of his brother and sisters, he directed the said stock monies and all interest then due to be distributed according to the statute of distributions:

JOHN WALKER, by his will, dated the 27th of *February* 1802, bequeathed his property to his executors upon trust, to convert the whole into money, and invest the money in 3 per cent. consolidated annuities, and out of the dividends and interest of such stock, to pay an annuity to his father, *Septimus Walker*, during his life. The will then proceeded as follows: "And until the death of my said father, upon further trust to permit and suffer my brother, *George Walker*, and my three sisters, *Mary*, *Hannah*, and *Betty*, to receive and take the residue and remainder of the dividends, interest, and proceeds thereof, for and during their natural lives, and to and for their respective uses and benefits, in equal shares and proportions; and from and immediately after the decease of my said father, I do hereby declare the whole of the said dividends, interest, and proceeds of the said stock money to be upon trust for such of my said brother and sisters as shall be then living, in equal shares and proportions; and further, it is my will and desire, that from and immediately after the decease of either of my said brother or sisters, leaving any child or children of their bodies lawfully issuing, then that the part or share of him or them so dying shall be paid to such child or children in equal shares and proportions during their natural lives, with benefit of survivorship; and in case either of my said brothers or sisters

Held, that the brother, who survived his three sisters, two of whom died without issue, was entitled to a life interest in three-fourths of the capital, and that the capital was undisposed of, and belonged to the next of kin of the testator, living at his death.

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sisters shall die, without leaving any such issue aforesaid, then upon trust to permit and suffer the survivor or survivors of them, respectively, to receive and take the interest, dividends and proceeds of the said stock monies, to his, her, or their respective uses and benefits; and from and immediately after the decease of the survivor of the said children of my said brother and sisters, then I do hereby declare that the said stock monies, and all interest and dividends, which shall be then due and in arrear, shall be distributed and disposed of according to the act of parliament made and passed for the distribution of intestates' estates."

The testator died, leaving his father, *Septimus Walker*, his sole next of kin; his brother, *George Walker*, and his three sisters mentioned in the will, surviving him. *Septimus Walker*, the father, died in the year 1805. *Hannah* and *Betty* died without issue; *Mary* married *James Bickerstaffe*, and died leaving two children; *George Walker* survived the three sisters, and assigned his interest under the will to the Plaintiff *Cooke*, who filed his bill upon the death of *George Walker;* and the question in the cause was, what interest, in the events which had happened, *George Walker* was entitled to under the will.

Mr. *Spence* and Mr. *Koe*, for the Plaintiff, contended that a gift of the interest of stock was equivalent to a gift of the principal; and that *George Walker*, having survived his three sisters, two of whom died without leaving children, was entitled to three fourths of the capital.

Mr. *James Russell*, for persons claiming an interest as next of kin of the testator at the death of *George*

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Walker, cited *Jones* v. *Colbeck* (*a*), *Bird* v. *Wood* (*b*), and *Briden* v. *Hewlett*. (*c*)

Mr. *Pemberton*, for the representatives of *Septimus Walker*, contended that a gift of the dividends or interest of stock would only carry the principal, where there was no explanatory context, but not where the testator had, as in the present case, distinguished between the capital and the dividends. The bequest over, after the death of the survivor of unborn children of the testator's brother and sisters, was void; because, though a life interest might be given to an unborn child of a person in *esse*, the gift of an absolute interest beyond that, was too remote; *Routledge* v. *Dorril*. (*d*) No question could arise, therefore, similar to that in *Bird* v. *Wood* and the other cases cited, as to what next of kin were intended in the limitation over, that limitation being void for remoteness. The capital was, consequently, undisposed of, and belonged to the representatives of *Septimus Walker*, who was the testator's next of kin, living at his death.

Mr. *Spence*, in reply.

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I am of opinion, upon the construction of this will, that *George Walker* took a life interest in three-fourths, one fourth in his own right, one fourth, the share which belonged to *Hannah*, and another fourth, the share which belonged to *Betty;* and that the *corpus* is undisposed of by the will. It is clear that the survivor of the brother and sisters was to take the shares of such of them as died without leaving a child. It is equally clear, that a gift

(*a*) 8 *Ves.* 38.
(*b*) 2 *Sim. & Stu.* 400.
(*c*) 2 *Mylne & Keen*, 90.
(*d*) 2 *Ves.* jun. 357.

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gift of the interest and dividends, standing by itself, would give the *corpus;* but the next following clause, plainly indicates that he meant only to give an interest for life.

After having given the dividends without express words of limitation, he proceeds to dispose of the capital in terms which fail for remoteness. The capital, therefore, is undisposed of, and goes to the next of kin of the testator, living at his death.

The ATTORNEY-GENERAL *v.* BRIGHT.

June 11, 25.

THE will of *Thomas Edwards*, dated the 13th of *April*, 1835, was in the following words: "I bequeath to my brother, *Joseph Edwards*, and his wife, during their natural lives, the interest of 500*l.* 4 per cent. stock, which will produce the sum of 20*l.* per annum, to them or the survivor of them during life; and after the death of the survivor of them, I give the sum of 500*l.* to *Susan Thomas*, daughter of *Joseph Thomas*, to receive the interest during life, and then to her issue; but, in case of her death without issue, the said 500*l.* stock to be divided between her father's children by his second wife, share and share alike; and in default of any children by his second wife being living at my death, I give the same to his said second wife."

The testator gave the sum of 500*l.* stock to *S. T.*, to receive the interest during life, and then to her issue; but in case of her death without issue, the said 500*l.* stock to be divided between her father's children by his second wife; and in default of any children by his second wife being living at the testator's death, over:

Held, that *S. T.* took an absolute interest in the sum of 500*l.* stock.

Joseph Edwards and his wife received the dividends of the stock during their lives. After the death of the survivor of them, the fund was transferred to the account of *Susan Thomas*, who received the dividends until her death, which took place on the 15th of *May* 1836.

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1836. She died without issue, and the question was, whether the fund belonged to her personal representative, or to the children of *Susan Thomas*'s father, by his second wife.

Mr. *Torriano*, for the representative of *Susan Thomas*, contended that, if the subject of the gift had been real estate, *Susan Thomas* would have taken an estate tail under the gift to her during her life, and then to her issue; and the gift being of personal estate, she took an absolute interest: *Chandless* v. *Price*. (*a*)

Mr. *Havens*, *contrà*, insisted that this was a good executory devise, and that in the event which had happened, the limitation over to the children of *Susan Thomas*'s father by his second wife took effect. In *Knight* v. *Ellis* (*b*), where there was a gift of the interest of monies to arise from the accumulation of rents to *A.* for his life, a gift of the monies to his issue male, and, in default of such issue, over, Lord *Thurlow* held that *A.*'s issue, if any, would have taken as purchasers; and that, upon his death without issue, the limitation over took effect. So in *Warman* v. *Seaman* (*c*), a term of years to *A.* for life, and afterwards to her issue, upon *A.*'s death, was held to vest in the issue as purchasers. In *Elliot* v. *Jekyl* (*d*), where there was an assignment of an interest of a lease to the use of *A.* for life, and afterwards of his issue, and for want of such issue, to the use of *B.*, the whole was held to vest in the issue of *B.*, as purchasers. In *Pleydell* v. *Pleydell* (*e*), a devise of 400*l.* to *A.*, and if *A.* die without issue then to *B.*, was supported as a good executory devise; and in the recent case of *Stonor* v. *Carwen* (*g*), where the testator

(*a*) 3 *Ves.* 99.
(*b*) 2 *Bro. C. C.* 570.
(*c*) *Pollexf.* 112.; and 2 *Ch. Ca.* 208.
(*d*) 2 *Ves.* sen. 681.
(*e*) 1 *P. Wms.* 748.
(*g*) 5 *Sim.* 264.

testator gave one-third of the residue of his estate and effects to his niece, which he desired might be settled by his executors on her for her separate use for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew, the Court directed a settlement, supporting the limitation over upon failure of such issue as were within the limits of executory devise.

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The Master *of the* Rolls held that the effect of the gift of the sum of 500*l.* stock to *Susan Thomas*, to receive the interest during her life, and then to her issue, was to give her an absolute interest in that sum; and that such absolute interest was not affected by the subsequent words of the will, the limitation over in case of her death without issue, unrestricted by any words limiting the generality of the expression "without issue," being void for remoteness.

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See *Lepine* v. *Ferard*, 2 *Russ. & Mylne*, 378.; and *Ferard* v. *Griffin*, *infra*.

WAKE *v.* PARKER.

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Jan. 15. 26.

ADAMSON PARKER, by his will dated the 17th of *July* 1837, gave, devised, and appointed to his sons, *Kenyon Stevens Parker*, *Adamson George Parker*, and *Thomas James Parker*, and their heirs as tenants in common three undivided fifth parts of all his freehold and

Demurrer, on the ground of misjoinder of Plaintiffs, to a bill by husband and wife, and their infant children by the husband, as next friend, for the administration of the estate of a testator under whose will the wife was entitled to separate estate, allowed; and leave given to amend the bill by inserting a next friend for the wife and infant children, and making the husband a Defendant.

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and copyhold messuages, lands, and tenements, and he gave, devised, and appointed the remaining two undivided fifth parts thereof to *Adamson George Parker*, and his heirs, upon trust to receive the rents and profits thereof, and pay the rents and profits arising from one of such moieties into the proper hands of his daughter *Harriet*, the wife of *Bernard John Wake*, for her life; and immediately upon her decease, he gave, devised, directed, and appointed one undivided fifth part of his said freehold and copyhold estates unto all and every of her children equally as tenants in common, and to their heirs respectively: and upon further trust that *Adamson George Parker*, his heirs or assigns, should pay the rents and profits arising from the other of the two moieties, into the proper hands of his daughter *Helen*, the wife of *Joseph Levick*, for her life; and upon her decease, he gave, devised, and appointed one other undivided fifth part of his said freehold estates, unto all and every her children as tenants in common, and to their heirs respectively. And he gave and bequeathed unto *Adamson George Parker* all his personal estate, upon trust to convert the same into money, and after payment of his debts and funeral expenses, upon trust to pay three-fifth parts of the money remaining in his hands unto *Kenyon Stevens Parker*, *Adamson George Parker*, and *Thomas James Parker*, equally share and share alike; and as to the remaining two fifth parts thereof, upon trust to place out the same on government or mortgage security, and pay one moiety of the interest arising therefrom to his daughter *Harriet* for her life; and immediately upon her decease, he gave one moiety of the money to be placed out as aforesaid unto all and every her children, share and share alike, and to their respective executors, administrators, and assigns; and he directed his trustee to pay the other moiety of the interest arising from the money to be placed out as afore-

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aforesaid, unto his daughter *Helen Levick* for her life; and upon her decease, he gave the other moiety of the money so to be placed out as aforesaid, unto all and every her children, share and share alike; with bequests over in case his daughter *Harriet Wake*, or his daughter *Helen Levick*, should die without leaving any child or children, or issue of any such child or children. And the testator directed that all rents, interest, and other monies payable to *Harriet Wake*, and *Helen Levick* should be paid into their proper hands respectively, and not by way of anticipation, for their respective separate use, and should not be subject to the debts, control, disposition or engagements of their present or any future husbands, and that the receipts of his said daughters alone should be sufficient discharges for the same, notwithstanding any thing thereinbefore contained. And the testator directed that his children should have full power to make partition of the whole or any part of his freehold and copyhold estates; and for such purpose, that *George Adamson Parker*, or his heirs, should be at liberty, as trustee for his said daughters, to convey the two-fifth parts thereof limited to him as thereinbefore mentioned, in such manner as he might be advised; and the testator directed that in case his sons or their heirs should be desirous of selling the entirety, or any part or parts of the said freehold and copyhold estates, the said *George Adamson Parker*, or his heirs, should be at liberty to convey as thereinbefore mentioned, the two fifth parts, notwithstanding the trusts thereof vested in him or them, he or they laying out, in the purchase of other freehold or copyhold estates, two fifth parts of the purchase money arising from the property so sold, which purchased estates should be conveyed to him or them upon the same trusts as he or they held the two fifth parts of the estate so sold. And the testator appointed *Adamson George Parker* sole executor of his will.

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The testator died on the 29th of *August* 1837, leaving his five children mentioned in the will surviving him, of whom *Kenyon Stevens Parker* was his heir at law; and his will was proved by *Adamson George Parker*, the executor named therein.

The bill was filed by *Bernard John Wake* and *Harriet* his wife, and *Helen Wake*, *Harriet Wake* the younger, *William Wake*, and *Bernard Wake*, infants, by *Bernard John Wake* their father and next friend, against *Kenyon Stevens Parker*, *Adamson George Parker*, *Thomas James Parker*, and *Joseph Levick* and *Helen* his wife; and it prayed that the will might be established, and the trusts thereof carried into execution under the direction of the Court, and that accounts might be taken of testator's personal estate, and of the rents and profits of his freehold estates, and that the clear residue of the testator's real and personal estate might be ascertained and applied according to the trusts of the will, and that a partition might be made of the freehold estates of the testator, and that a commission of partition might issue, and all necessary directions be given relating thereto; or otherwise, that the freehold estate might be sold, and one fifth part of the proceeds of such sale be secured for the benefit of the Plaintiffs, in such manner as was directed by the will; and that in the meantime a receiver might be appointed.

To this bill the Defendants, *Adamson George Parker*, and *Thomas James Parker*, put in a general demurrer for want of equity.

Mr. *Kindersley* and Mr. *Bacon*, in support of the demurrer.

This bill is demurrable for misjoinder of Plaintiffs. The interest to Mrs. *Wake*, under the testator's will, being given

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given to her separate use, she ought to have sued by her next friend, and her husband should have been made a Defendant. There is no principle more clear, than that where trustees or executors are called upon to account, the suit ought to be so framed as to dispose of the questions raised by it, without rendering the trustees or executors liable to any further suit. Now, a bill by husband and wife, in her right, is the bill of the husband; *Pawlet* v. *Delaval* (*a*); and if a decree be made for the usual account, in this suit, the wife may, nevertheless, file a separate bill by her next friend, to have her interest secured to her. In *Hughes* v. *Evans* (*b*), Sir *John Leach* decided, that where a married woman joins as a co-plaintiff with her husband, instead of suing by her next friend, the suit is to be considered as the suit of the husband alone, and will not prejudice a future claim by the wife. So in *Reeve* v. *Dalby* (*c*), the same judge held, that a suit by husband and wife, against the trustees of the wife's separate property, could not be pleaded in bar to a subsequent suit by the wife, by her next friend, against her trustees and husband and another defendant, though the relief prayed in both suits was the same. It is clear, therefore, upon these authorities, that the present suit, if permitted to proceed, would not exempt the executor from the liability to be vexed by another suit, for the same matters, which the wife may institute by her next friend. In *Sigel* v. *Phelps* (*d*), the last reported case in which this point of pleading was considered, and in which the suit was instituted by a husband and wife, for the purpose of having the arrears of an annuity, given to the wife's separate use, paid to her, and for the appointment of new trustees of the estates charged with the annuity, and for a receiver, the Vice-Chan-

(*a*) 2 *Ves.* sen. 666.
(*b*) 1 *Sim. & Stu.* 185.
(*c*) 2 *Sim. & Stu.* 464.
(*d*) 7 *Sim.* 239.

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Chancellor was of opinion, that, as the suit related to the wife's separate property, she and her husband ought not to have been made co-plaintiffs; but the bill ought to have been filed by the wife, by her next friend, and the husband ought to have been made a Defendant.

Besides the liability to be vexed by another suit, which is a particular objection applicable to the case of a husband and his wife having separate estate, there is the general objection applicable as well to this, as to all other cases, in which a plaintiff having an interest in the subject of the suit, is improperly joined with a plaintiff who has none. The wife is a *feme sole* in respect of her separate estate, and, so far as that separate estate is concerned, the husband is a mere stranger. On the same principle, therefore, on which it has been decided in several recent cases, that, where one or more plaintiffs have an interest in the subject-matter of the suit, and other co-plaintiffs have no interest, a general demurrer to the whole bill is a good defence, this demurrer must be allowed: *King of Spain* v. *Machado* (*a*), *Makepeace* v. *Haythorne* (*b*), *Glyn* v. *Soares.* (*c*)

It follows as a necessary consequence of the rule as to misjoinder of plaintiffs, that the husband cannot, in this suit, fill the character of next friend of the infant children.

Mr. *Pemberton* and Mr. *Tillotson*, *contrà*.

This is a bill, filed by a husband and wife, with their infant children suing by the husband as their next friend, against the executor and other parties for the administration of the estate of the wife's father, under whose

(*a*) 4 *Russ.* 560.
(*b*) 4 *Russ.* 244.
(*c*) 3 *Mylne & Keen*, 450.

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whose will she claims an interest which is given to her separate use; and if to such a bill a demurrer, denying the right of the Plaintiffs to any discovery or relief, upon the ground that a husband is so perfect a stranger to his wife, in respect of property given to her separate use, and limited, as in this case, for the benefit of the children, that he cannot even be joined with her as a co-plaintiff, or act as the next friend, and natural protector of the interests of his children, — if such a rule of pleading is to be the law of this Court, it is calculated to give occasion to enormous inconvenience and injustice. But unless the case of *Sigel* v. *Phelps* is to introduce a new rule of pleading, and to overturn previous decisions upon this point, this is not the law of the Court. In *Smyth* v. *Myers* (*a*), a feme covert, who had a separate estate, was the plaintiff in the cause, and she named her husband as next friend; and upon a motion to strike out the husband's name as next friend, and make him a co-plaintiff, Sir *John Leach* said it was necessary that the husband should be a substantive party to the suit, and by joining the wife as a co-plaintiff, as proposed, the husband would admit the statement in the bill that it was the separate property of the wife, and this would answer all the purpose of making him a defendant. This is an express authority in support of the present bill, and it has been the constant practice of pleaders, both before and subsequently to the case of *Smyth* v. *Myers*, to make the husband a co-plaintiff with the wife, in suits for establishing her claims to separate estate, where the interest of the husband is not substantially adverse to that of the wife, as it would be in a case of fraud, or where the husband was an accounting party, or otherwise had an interest directly opposed to that of his wife. Where the wife sues for her

(*a*) 3 *Madd.* 474.

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her separate property, the husband must be either a plaintiff or a defendant; and upon what principle is it contended that she may not sue with him as a co-plaintiff; or, if she think fit, make him her next friend? The wife is, *quoad* her separate property, a *feme sole*; and admitting that her husband is, in respect of that separate property, a mere stranger, why is he to be in a worse position than a mere stranger? Is it insisted that the husband is the only stranger in the world, whom she may not name as her next friend? If the husband is ready to charge himself with responsibility as to the costs of the suit, why is the wife, having separate estate, to be precluded from making her husband her next friend, as well as any other stranger? The wife has the absolute dominion over her separate property, if it be not fettered by any clause against anticipation; she may give it to her husband, if she chooses; and if she may give it to her husband, upon what rational principle can it be contended that she may not join with her husband as a co-plaintiff, or make him her next friend for the purpose of recovering it? Will it be contended that the proceeding, instituted for the purpose of recovering her separate property, requires a stronger protection against the husband, and a more cautious exclusion of him, than the power of giving it to him when it is actually reduced into possession? There is no authority to support so extravagant a proposition: on the contrary, in a case before the present Lord Chancellor, when Master of the Rolls, it was argued, in answer to an objection similar to that now taken by way of demurrer, that the husband, co-plaintiff with his wife having separate estate, might well be considered as the next friend of the wife; and the view so taken in argument was approved by the Court. *Hughes* v. *Evans* is cited, for the purpose of establishing the proposition, that where a husband and wife sue as co-plaintiffs for the wife's separate estate, the wife is not bound by the suit; but is it probable that

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that the same judge, who decided in the year 1818 that the husband and wife were properly joined in such a suit, should, in the year 1823, have made a directly contrary decision? The reason of this apparent discrepancy is, that there is great peculiarity in the circumstances of the case of *Hughes* v. *Evans*. That was not a mere suit to recover the wife's separate estate; but it was a suit by the husband and wife, the object of which was to charge the estate of an intestate to which the wife administered without having ever acted, and the sole acting administrator of which afterwards devised his estates in trust for the wife's separate use. One of the principal points in the cause was, whether the acts and declarations of the husband, in respect of his alleged charge upon the estate of the intestate, could be used as evidence against the wife, who afterwards became interested in that estate; and the Vice-Chancellor was of opinion that they could not. It is evident that there is nothing in this case inconsistent with the previous decision of Sir *John Leach*, in *Smyth* v. *Myers*, that the husband and wife were properly joined as co-plaintiffs in a suit for her separate property, a decision from which it necessarily follows that the wife would be bound by a suit in which she so joined as co-plaintiff with her husband. In *Reeve* v. *Dalby*, the wife in the second suit charged fraud against her husband and the trustees; and fraud, of course, over-rides the general proposition established by *Smyth* v. *Myers*. There is no case, therefore, to affect the previous decisions, or the general practice of pleaders, except the last case of *Sigel* v. *Phelps*, and that is a short note of a loose conversation between counsel, in which nothing is stated as to the facts of the case, or the nature of the defence; and no decision, properly so called, was pronounced by the Vice-Chancellor. It is impossible that previous authorities, and the practice which has prevailed, in conformity with

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these authorities, can be over-turned by so loose and unsatisfactory a note as this. The practical inconvenience, which would arise from the adoption of the rule of pleading supposed to be established by that case would be extremely great; and the hardship would be greater in proportion to the smallness of the fund sought to be recovered. Why should a wife, suing for her separate property, be compelled to incur the unnecessary expense of making her husband a party defendant, or be exposed to the liability of finding no person who would consent to act as her next friend, and thereby render himself responsible for the costs of the suit? In the latter case, the rule would operate as a complete denial of justice; and it must be admitted that this is a possible, and even a probable case, where the fund is small, or the right of the married woman doubtful. In practice, therefore, the consequences of such a rule may be most mischievous and oppressive, while the only purpose, for which it is introduced, is the maintenance of the absurd technical fiction that, where property is given to the separate use of a wife, and settled, as it is in most cases, for the benefit of her children, a husband has no interest in a suit instituted for the purpose of reducing that property into her possession. It is evident that the husband has the strongest moral interest in such a suit; upon what principle of equity, then, can he be prevented from aiding his wife in recovering her separate property, by joining with her as co-plaintiff in such a suit? The payment of the fund, or the settlement of the fund to the proper uses, is a totally distinct consideration from the question whether such a suit by the husband and wife shall be entertained; and the Court will take care to protect the wife's interest, either by a reference to the Master, as in *Simonds* v. *Horwood* (*a*), or by following the course taken in subsequent cases, where this

(*a*) 1 *Keen*, 7.

this Court has directed a petition for payment of the fund to be presented on behalf of the wife.

Mr. *Kindersley*, in reply.

It is surely more convenient that an uniform rule of pleading upon this point should be established, than that a frame of suit should be allowed to continue which is admitted to be so irregular as to require the constant vigilance of the Court in protecting the wife's interest against a misapplication of her separate fund, if it were suffered to go out of Court without precautions taken to secure the interest of the wife. The case of *Simonds* v. *Horwood* confirms the other authorities, which shew that the suit of the husband and wife having separate estate is the suit of the husband alone; but there the trustees took no objection to the frame of the suit, which must either be pleaded or raised by the answer: *Raffety* v. *King*. (*a*) The ordinary language in which property is limited to the separate use of a wife, providing that it shall be free from the debts, interference, or control of her husband, is of itself sufficient to shew that the interest of the husband is in this respect intended to be, and is in fact adverse to that of the wife, and, if adverse, it is a misjoinder to unite them as co-plaintiffs. In *Smyth* v. *Myers*, which is so much relied upon, Sir *John Leach* says, "The claim of the wife to separate estate is against the *jus mariti*," and he proceeds to observe, that, by joining the wife as co-plaintiff in a suit for her separate estate, the husband will admit the statement in the bill that it is her separate property. The husband, therefore, would be bound, but no opinion is expressed as to the wife being bound by such a suit; upon that point, therefore, the case determines nothing.

(*a*) 1 *Keen*, 601.

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thing. That case shews also that it is impossible to maintain the proposition that a wife can be made the next friend of her husband, or converted by construction of the Court into a next friend, if she be made a co-plaintiff. The husband is emphatically the person against whom a wife, having separate property, is to be protected; to make the husband her next friend, therefore, is *agnam committere lupo*. There is nothing in the language of Sir *John Leach*, either in *Hughes* v. *Evans*, or in *Reeve* v. *Dalby*, from which it can be inferred that his decisions went upon the particular circumstances of those cases; he lays down a general proposition upon the point of pleading. As to *Sigel* v. *Phelps*, the nature of the case is sufficiently stated in the report to render the point intelligible, and the opinion expressed by the Vice-Chancellor on that point is clear and precise.

Jan. 26.

The MASTER *of the* ROLLS.

The testator in this cause, having devised and bequeathed an equal fifth part of his real estate, and of his residuary personal estate to the Plaintiff Mrs. *Wake* for her separate use, without power of anticipation, for her life, and after her death to her children in equal shares, the bill is filed by Mr. and Mrs. *Wake* and their children, two of them being infants suing by Mr. *Wake* as their next friend, against the trustee and executor and the other devisees and legatees of the real estate, and residuary personal estate, for an account; for payment to Mrs. *Wake* of her share of the rents, and for an investment of the share of the residuary personal estate, which is given to her for her life, and after her death to her children; and for other purposes.

To

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To this bill, two of the Defendants, both of whom are residuary legatees, and one of whom is trustee and executor, have put in a general demurrer for want of equity; and the grounds of demurrer stated at the bar are — first, that the husband and wife ought not to be permitted to sue together for the separate estate of the wife; and secondly, that the husband having no interest in the subject-matter of the suit, is, on that account, misjoined as a Plaintiff.

Courts of equity have from an early period permitted married women to sue for their separate estates by their next friends, and to make their husbands defendants; and a married woman, being, as to her separate estate, considered as a *feme sole*, the courts have acted upon the principle that, in the prosecution of such suits, her authority and consent should be necessary, and should be given and continued independently of her husband; and accordingly, it is said in *Andrews* v. *Cradock* (*a*), that, if such a bill be filed without the authority of the wife, the same may, upon her affidavit of the matter, be dismissed; and from the case of *Lawley* v. *Halpen* (*b*), it appears that, if the wife has reason to think that the next friend appointed by herself colludes with her husband, she may, for that reason, have her next friend changed, on procuring security to be given for costs.

Now a suit instituted and carried on by the husband and wife has been considered as the suit of the husband alone, and *primâ facie*, at least, the wife cannot be said to have any control or authority over it: she may possibly have authorised her husband to prosecute the suit, but, in the absence of any thing to shew that she had done so, the suit must be considered as the suit of the husband.

It

(*a*) *Gilb.* 36. *Prec. in Cha.* 376. (*b*) *Bunb.* 310.

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It has undoubtedly been very usual to file such bills, and many decrees have been made without objection in suits instituted by the husband and wife for the wife's separate estate, the Court itself taking care that the separate estate of the wife recovered in such suits shall be protected from the husband. Thus in *Griffith* v. *Hood* (*a*), the bill was filed by the husband and wife for the separate estate of the wife. Lord *Hardwicke* said, "Where there is any thing for the separate use of the wife, a bill ought to be brought by her next friend for her; otherwise it is her husband's bill. However, there have been many cases of such bills, and the Court has taken care of the wife, and ordered payment to some person for her;" and in that case he ordered the interest of the money, which was to be invested, to be paid to the wife, or some person authorised by her for her separate use. And it is in this way that the Court now commonly acts in such cases, and it does not appear that any valid objection can be made to the practice. If the amount of the sum recovered be all that the wife is entitled to, and if the sum so recovered be secured to her separate use, she has all that she could obtain in any suit, and could make no further or renewed claim against the accounting party, who had been compelled by the suit to satisfy her demand. In the case of *Chesslyn* v. *Smith* (*b*), where stock was settled to the separate use of a married woman, and after her death for her husband absolutely, Sir *W. Grant*, in a suit instituted by the husband and wife, decreed a transfer of the stock to the husband on his giving personal security for the same; and I think that many cases have occurred of suits by husband and wife in which the wife may have seemed to require protection from the husband, and yet decrees have been made without objection.

Never-

(*a*) 2 *Ves.* sen. 452. (*b*) 8 *Ves.* 185.

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Nevertheless, whenever the attention of the Court has been drawn to the subject, such suits have always been considered to be the suits of the husbands, and to be instituted and prosecuted by them, and under their influence. The husband, having the power to use his wife's name, may file the bill without her knowledge, and may prosecute it in a manner not favourable to her interests. If the wife's claim be not of a liquidated or specific sum, but of a sum to be ascertained by an account, though the Court might, and certainly would, protect her in the enjoyment of the sum recovered upon the account, that sum might not be the just amount of her right, because the account taken under the proceedings may not have been properly taken; and if the principle be, as I think it is in those cases, that the wife is, as to her separate estate, entitled to prosecute the suit by her own authority, independently of her husband, there seems to be no reason why a suit, instituted by her husband, should bind her,— why she may not, at any time, institute a new suit for the same matter by her next friend, or why a decree (not being a decree for a specific sum secured by the Court for her separate use, and there being no evidence that it was prosecuted with her consent and authority) should be a bar to a new suit instituted by her next friend.

It is true, as was stated by Sir *John Leach* in *Smyth* v. *Myers* (*a*), that the husband, by joining the wife as a co-plaintiff, admits that the property, sought to be recovered or secured, is the separate property of the wife; but the wife appears to be further entitled to have the amount of the sum, to be recovered or secured, ascertained by a proceeding of her own, independently of her husband, and the party sought to be charged is entitled

(*a*) 3 *Mad.* 474.

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entitled to be protected against a subsequent independent claim of the wife. And in the subsequent cause of *Hughes* v. *Evans* (*a*), Sir *J. Leach*, upon the authorities of *Griffith* v. *Hood* and *Pawlet* v. *Delaval*, there cited to him, stated that where the husband and wife join in the suit as plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that it will not prejudice a future claim by the wife in respect of her separate estate; and on that opinion he acted in *Reeve* v. *Dalby*. (*b*)

It was argued that these authorities do not apply to cases in which there is no dispute between husband and wife; but in considering them, I think that they do not admit of that limitation, and it is necessary to regard the interests of all parties. Not only ought the wife to be protected in the enjoyment of her separate property, but the parties also, who are sued, ought to be protected against concurrent or consecutive demands of the husband suing in the names of himself and his wife, and of the wife suing by her next friend. If such suits were allowed, it is obvious that great oppression might be practised by the husband and wife acting in concert together.

It is, I presume, for reasons of this nature, that the Vice-Chancellor has, in several instances, the notes of some of which I have seen, made orders to amend bills filed by the husband and wife for the separate estate of the wife, by making the husband a defendant, and inserting the name of a next friend for the wife as plaintiff; and in the case of *Sigel* v. *Phelps* (*c*), he intimated his intention to dismiss the bill if the defendants would not consent

(*a*) 1 *Sim. & Stu.* 185.
(*b*) 2 *Sim. & Stu.* 464.
(*c*) 7 *Sim.* 239.

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consent to a decree. And it is for the same reason that I have, though I admit with reluctance, come to the conclusion that I ought to allow this demurrer. I say with reluctance, because I think that suits thus constituted are of familiar occurrence, and I am aware that many decrees have been made in such suits without any inconvenience arising. I think also that in cases in which the husband and wife are not hostile, very little, if any additional security is obtained for the wife by the appointment of a next friend, the probability being that, in such cases, the next friend is appointed by the wife on the recommendation of the husband. If a bill by husband and wife for the wife's separate estate were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think that a decree ought to be made. And in many other cases I apprehend that, with no more attention than the Court owes to the suitors, effectual means might be employed to ascertain whether the suit was carried on with the free consent of the wife, and to secure the defendants from any further claims on her part. But confining myself to the present case, in which my attention must be exclusively directed to the statements made in the bill, in which the objection is made by the Defendants at the earliest period in the cause, and in which the separate estate of the wife partly consists of a sum to be ascertained by account, I think myself bound to give effect to the objection. I therefore allow the demurrer; but I think that no costs should be given, and I give leave to amend by striking out the name of Mr. *Wake* as Plaintiff, and as next friend of his infant children, and making him a Defendant, and by inserting the name of a next friend to the wife and infant children.

1838.

Jan. 18. NIAS *v.* The NORTHERN and EASTERN Railway Company.

A case laid before counsel was excepted in an order for the production of documents, the Court considering itself bound by the decision upon the authority of which the case was held to be privileged, but expressing dissent from that decision.

THE bill was filed by the Plaintiff on the 4th of *May* 1837, for the specific performance of a contract, entered into by the Defendants on the 13th of *May* 1836, to purchase of the Plaintiff certain leasehold premises situate at *Islington*. The Defendants, in answer to that part of the bill which charged the possession, and required the discovery and production of documents, said they had in the schedule to their answer set forth a list of the several books, drafts, abstracts, letters, documents, and papers which related to the matters mentioned in the bill; but they said that the cases for the opinion of counsel, and the opinions therein set forth in the said schedule, had reference to the matters in question in this cause, and the same were submitted to counsel after the several matters in dispute in this cause had arisen and bore reference thereto, and therefore the Defendants submitted the same ought not to be produced.

Among the documents enumerated in the schedule, were a case with the opinion of Mr. *Humphrey*, dated the 12th of *December* 1836, Mr. *Humphrey*'s opinion, and further opinion on the abstract of the Plaintiff's title, dated respectively the 17th of *January* 1837, and the 14th of *February* 1837, and the opinion of Mr. *Law* on the same, dated the 10th of *February* 1837.

Mr. *Pemberton* moved for the production and deposit with the clerk in Court of the several documents enumerated in the schedule, including the cases laid before counsel,

counsel, but excepting the opinions. To the production of the cases laid before counsel, as distinguished from the opinions of counsel upon them, the Defendants were entitled on the authority of the case of *Radcliffe* v. *Fursman* (*a*), which was affirmed upon appeal in the House of Lords, and which was followed in cases of so recent a date as *Preston* v. *Carr* (*b*), and *Vent* v. *Pacey*. (*c*)

Mr. *Tinney* and Mr. *James Parker*, *contrà*.

All the cases and opinions enumerated in the schedule are protected, on the principle established in *Bolton* v. *The Corporation of Liverpool* (*d*); for the Defendants by their answer say, that the cases were submitted to counsel after the matter in dispute had arisen between the parties, and bore reference thereto. The Defendants do not, however, in fact object to any of the papers mentioned in the schedule, except the case and opinion dated the 12th of *December* 1836. The case of *Radcliffe* v. *Fursman* has never been approved, and it has been repeatedly held that the doctrine in that case ought not to be carried further. As to *Preston* v. *Carr*, the authority of that case has been shaken by the subsequent cases of *Hughes* v. *Biddulph* (*e*), and *Bolton* v. *The Corporation of Liverpool*, where Lord *Brougham* went very fully into the consideration of this subject, and said, in commenting upon the supposed right of calling for the production of cases laid before counsel in contemplation of, or with reference to, legal proceedings: "It seems plain that the course of justice must stop, if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the

(*a*) 2 *Bro. P. C.* 514. *Toml.* edit.
(*b*) 1 *Y. & J.* 175.
(*c*) 4 *Russ.* 193.
(*d*) 1 *Mylne & Keen*, 88.
(*e*) 4 *Russ.* 190.

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the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence may, and often does, contain the whole of his evidence." The matters in dispute between the parties first commenced in the month of *November*, and the case, of which the production is objected to, was laid before Mr. *Humphrey* in the following month, so that it clearly falls within the principle of protection laid down by Lord *Brougham*. In the recent case of *Knight* v. *The Marquess of Waterford* (*a*), Lord *Abinger* mentioned, in the course of the argument, that it was by his advice that the defendants in the cause of *Bolton* v. *The Corporation of Liverpool* appealed from the decision of the Vice-Chancellor, and that he (Lord *Abinger*) thought Lord *Brougham* had gone too far, not in supporting privileged communications between solicitor and client, but in refusing protection to them. And in the judgment in that case Lord *Abinger* says: "As to the decision of Lord *Brougham* and the Vice-Chancellor, I should say that the statement for counsel, which they ordered to be produced, was as much protected as that which they refused." (*b*) That authority, therefore, would go to protect cases laid before counsel, as well as opinions of counsel under all circumstances, and, in truth, if opinions of counsel are entitled to protection, which has never been disputed, it seems impossible that such protection can be effectual without also withholding the statements on which the opinions are given.

Mr. *Pemberton* in reply.

If the decision in *Bolton* v. *The Corporation of Liverpool* went too far, the excess certainly was not on the side complained of by the Lord Chief Baron of the Exchequer;

(*a*) 2 *Yo. & Coll.* 22. (*b*) *Ibid.* p. 40.

Exchequer; the aberration from the principles recognised in this Court consisted, not in granting too little indulgence to privileged communications, but in imposing too many restrictions on the right to discovery. But the present case does not fall within the principle of protection laid down by Lord *Brougham* in *Bolton* v. *The Corporation of Liverpool.* The Defendants were perfectly content with the contract which they had entered into with the Plaintiff, until the line of their railway was altered; and then, when they had no occasion for the property which they had agreed to purchase, they first began to take objections to the Plaintiff's title. The production of the case laid before Mr. *Humphrey* would shew that the objection to the title was a mere after-thought, and that the Defendants had no just ground whatever for resisting the specific performance of their agreement. The case, and the view with which it was laid before counsel, are parts of the Plaintiff's equity in respect of which he has a right to discovery. The production of that case would, as the Plaintiff insists, shew that the Defendants are unjustly attempting to rescind their contract in consequence of circumstances wholly extrinsic and collateral to the contract itself, and entirely unconnected with the question of title. This is a matter as to which the Plaintiff has a right to sift the conscience of the Defendants, and that right cannot be resisted consistently with the principles which, with the exception of the cases which have recently occurred in the Court of Exchequer, have uniformly prevailed in courts of equity.

The MASTER *of the* ROLLS.

If the question were unaffected by authority, I should think that the order ought to be made to the extent that is asked; but having regard to the case of *Bolton* v. *The*

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The Corporation of Liverpool, and to the principles there laid down, it does not appear to me that the present case can be satisfactorily distinguished from it; and whatever may be my own opinion, I think myself bound to follow that authority.

I do not concur in the opinion that the decision in *Bolton* v. *The Corporation of Liverpool* went too far in ordering the production of documents, but on the contrary am inclined to think that, consistently with former authorities, more discovery than was allowed in that case might have been given. It seems strange to say that justice can be promoted by concealing the truth, by suppressing the knowledge of any fact or any statement of the parties which bears upon the question to be decided. It is often easier to exclude evidence than to determine what weight ought justly to be attributed to it when received: a bad cause may suffer, and the evasion of justice may be prevented, by compelling the party to disclose a material fact; but the object is not to save the trouble or lessen the responsibility of the judge, to protect a bad cause, or to facilitate the evasion of justice, but, if possible, to do justice, and for that purpose to get at the whole truth; and I confess that I have yet to learn how concealment of the truth, or hiding from the Court that which is known to any of the parties, and relates to the matter in question, can in any way promote justice.

Conceiving myself bound by authority, I do not make any order for the production of the case of *December* the 12th, 1836. If the Plaintiff should be advised that he is entitled to it, an application to the Lord Chancellor may settle the question.

1836.

BETWEEN

MARY ANN COLYEAR - - Plaintiff,

1836.
May 6, 7.
Aug. 5.

AND

The Rt. Hon. MARTHA SOPHIA, Countess of MULGRAVE, widow, The Hon. EDWARD PHIPPS, The Rt. Hon. THOMAS CHARLES, Earl of PORTMORE, The Governor and Company of the Bank of ENGLAND, WILLIAM HENRY SURMAN, ANDRE LIBERT ROMAIN VIOLLET, and HARRIET FRANCES his Wife, JOHN AMBROSE CLERK, and JULIANA CATHERINE his wife, and EDWARD ROGER, and ELEANOR his wife; Defendants.

(By Bill of Revivor and Supplement.)

BETWEEN

The same - - - Plaintiff,

AND

JONATHAN BRUNDRETT, and FREDERICK WALLER - - - Defendants.

THE original bill was filed in the month of *October* 1834, by the Plaintiff, who was one of the four natural daughters of the Earl of *Portmore*, against the Countess

A father, who had four natural daughters and a legitimate son, entered into an agreement

with his son, evidenced by certain deeds, whereby the father covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and died before the covenant on the part of the father was performed, having by his will given the whole of his property to his father, who became the son's personal representative.

A demurrer to a bill filed by one of the natural daughters, and praying to have the agreement executed against the estates of the father and son, was allowed.

Where two persons for valuable consideration as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, though either of the two might do so against the other.

1836.

COLYEAR
v.
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Countess of *Mulgrave*, and the Hon. *Edward Phipps*, the representatives of the Earl of *Mulgrave*, who was the surviving trustee under the settlement, made on the marriage of the Earl of *Portmore*, against the Earl of *Portmore*, the Plaintiff's father; her three sisters with their husbands, and other parties; and it prayed that the Plaintiff and the Defendants, her three sisters, might be declared to be entitled, under a deed dated the 19th of *August* 1818, to a lien on the personal estate of *Brownlow Charles Colyear*, deceased, to the extent of 20,000*l.*; and that the Defendant, the Earl of *Portmore*, might admit assets sufficient to answer that lien, or that the usual accounts might be taken of *Brownlow Charles Colyear*'s personal estate, and that it might be declared that the sum of 19,350*l.* 5*s.* 9*d.*, 3½ per cent. reduced annuities, in the pleadings mentioned, formed part of the fund on which the Plaintiff and the Defendants, her sisters, had such lien; and that the deficiency of the sum of 20,000*l.* might be paid by the Earl of *Portmore*, out of the assets of *Brownlow Charles Colyear*, with the consequential directions.

The Earl of *Portmore* answered the bill, but died on the 18th of *January* 1835. A bill of revivor and supplement was filed against *Jonathan Brundrett* and *Frederick Waller*, his executors, and the original bill was amended. The pleadings extended to an enormous bulk, and it was ultimately arranged that a demurrer should be filed to the amended bill and bill of revivor, as the least expensive mode of determining the question between the parties. In pursuance of this arrangement, the Defendants, *Jonathan Brundrett* and *William Frederick Waller*, filed a general demurrer to the bill for want of equity. The facts stated by the bill, so far as they are material, and have reference to the questions argued upon this demurrer, were as follows: —

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In the year 1810, *Thomas Charles* Viscount *Milsington* was, under his marriage settlement, entitled in possession to a rent charge of 500*l.* a year, to continue during the joint lives of himself and his father; and to the interest of 5000*l.*, and also of 19,350*l.* 5*s.* 9*d.* 4 per cent. Bank annuities, to continue for his own life; and expectant upon the death of his father, he was entitled for his life to the rents and profits of certain freehold and leasehold estates, and to the dividends of 38,483*l.* 9*s.* 3 per cent. Bank annuities.

His wife had died, having left an only child, *Brownlow Charles Colyear*, then an infant, who under the same settlement was entitled, subject to his father's life interest, to the 5000*l.* and 19,350*l.* 5*s.* 9*d.* 4 per cent. annuities; and, subject to the life interests of his father and grandfather, *Brownlow Charles Colyear* was entitled to the 38,483*l.* 9*s.* 3 per cent. annuities, and to certain estates for the interest limited to him by the settlement.

On the 14th of *March* 1810, Lord *Milsington*, by deed, and for some consideration, assigned to *Alexander Bruce* the rent charge of 500*l.* a year, his life interest in the 5000*l.*, and 19,350*l.* 5*s.* 9*d.* 4 per cent. annuities, and his expectant life interest in the 38,483*l.* 9*s.* 3 per cent. consolidated Bank annuities.

Lord *Milsington* had seven natural children, the Plaintiff in the present suit, and three other daughters, and three sons.

Mr. *Colyear*, his only legitimate child, attained his age of twenty-one years on the 4th of *August* 1817, and in the following month made a will, by which he gave the whole of his property to Lord *Milsington*, his father.

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Lord *Milsington* was very much in debt, and Mr. *Colyear*, his son, had considerable property, which he derived from his maternal grandfather, the Duke of *Ancaster*.

In *August* 1818, Lord *Milsington* and Mr. *Colyear* entered into the arrangement under which the Plaintiff claimed relief. Lord *Milsington* and Mr. *Colyear*, at that time, concurred in desiring to make a provision for the natural daughters of Lord *Milsington*, and for the payment of Lord *Milsington*'s debts. The intention was to make the sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. Bank annuities, which was comprised in Lord *Milsington*'s marriage settlement, and the interest in which had been already assigned to Mr. *Bruce*, available as a provision for the natural daughters of Lord *Milsington*; and for that purpose Mr. *Colyear* agreed, at his own expence, to repurchase that sum from *Bruce* or his assignees, and also to make up the value of the provision to 20,000*l.* sterling.

The arrangement was evidenced by three deeds, all of them dated the 19th of *August* 1818.

By the first deed, made between Lord *Milsington* of the first part, Mr. *Colyear* of the second part, and the Defendant *William Henry Surman* of the third part, after reciting that Lord *Milsington* and Mr. *Colyear* intended to treat with Mr. *Bruce*, or his assignees, to repurchase the rent-charge of 500*l.* a year, and Lord *Milsington*'s interest in the 5000*l.*, the 19,350*l.* 5*s.* 9*d.* 4 per cent. Bank annuities, and the 38,483*l.* 9*s.* 3 per cent. consolidated Bank annuities, and, if that could not be effected, to have the indenture of the 14th of *March* 1810 discharged by legal proceedings; and that Mr. *Colyear* should pay to *Bruce*, or his assignees, the original

ginal consideration money, and all arrears of the annual sums and all costs, and that Mr. *Colyear* should covenant to commence and carry on any suit for those purposes; and reciting that, in the event of such repurchase being made, or exoneration being had by *Thomas Charles* Viscount *Milsington* and *Brownlow Charles Colyear*, of the said *Alexander Bruce*, or such other person or persons as aforesaid, it had been among other things proposed and agreed that the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. consolidated Bank annuities, should be transferred or paid, together with a further sum of money, so as to make 20,000*l.* of lawful money of *Great Britain*, into the name of a trustee for the purpose of making a provision for *Harriet Frances Colyear*, the wife of *André Libert Romain Viollet*, *Mary Ann Colyear*, *Juliana Catherine Colyear*, the wife of *John Ambrose Clerk*, and *Eleanor Colyear*, the wife of *Edward Roger*, the four natural daughters of the said *Thomas Charles* Viscount *Milsington*; and that Lord *Milsington* and *Brownlow Charles Colyear* should accordingly give up and relinquish their respective interests therein, and procure such transfer to be made; and also that the said *Brownlow Charles Colyear* should invest such further sum in such manner as in the indenture of arrangement was after mentioned, as together with the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. consolidated Bank annuities would amount in value, according to the market price thereof, to the sum of 20,000*l.* sterling, and that all necessary acts and deeds should be made, done, and executed to effect the transfer of the said 19,350*l.* 5*s.* 9*d.* 4 per cent. annuities, and to release and exonerate the trustees in the marriage settlement of Lord *Milsington*; and further reciting that it had also been proposed and agreed that, in the event of such repurchase being made or exoneration being had as aforesaid, *Thomas Charles* Viscount *Milsington* should

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relinquish his life interest in the said sum of 38,483*l.* 9*s.* 3 per cent. consolidated Bank annuities unto the said *Brownlow Charles Colyear*, so that the said *Brownlow Charles Colyear* might become absolutely entitled to the same immediately on the death of the said *William Charles* Viscount *Milsington;* and that it had also been proposed and agreed, that such further covenants and agreements should be entered into as were thereinafter contained; and reciting that *Thomas Charles* Viscount *Milsington* and *Brownlow Charles Colyear*, having fully considered such proposals and agreements, had arranged and determined to carry the same into effect; it was witnessed, that in pursuance of the said agreement, and in consideration of the covenants and agreements on the part of *Thomas Charles* Viscount *Milsington*, he, *Brownlow Charles Colyear*, did, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with *Thomas Charles* Viscount *Milsington*, his executors, administrators, and assigns, that when and so soon as the dividends, interest, and income which should thenceforth become due and payable during the life of *Thomas Charles* Viscount *Milsington*, in respect of the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. consolidated Bank annuities, or the produce thereof, or the stock, funds, and securities on which the same should for the time being be invested, should be repurchased or be exonerated as aforesaid, he, *Brownlow Charles Colyear*, his executors, administrators, or assigns, would, at the request of *Thomas Charles* Viscount *Milsington*, his executors, administrators, or assigns, join and concur with him, *Thomas Charles* Viscount *Milsington*, in procuring the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. consolidated Bank annuities, or in case the same should be then transferred or carried into any other stocks, funds, or securities, then the stocks, funds, or securities into which the same should be so transferred or carried to be

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be paid to, or transferred, or assigned to and in the name of the said *William Henry Surman*, as a trustee appointed for that purpose by *Thomas Charles* Viscount *Milsington* and *Brownlow Charles Colyear;* and also that all proper and necessary acts, deeds, and assurances should be made, done, and executed to make and effect such transfer, and to release, exonerate, and discharge the trustees for or on account thereof; and also that he, the said *Brownlow Charles Colyear*, would, within the space of seven days after such last-mentioned payment, transfer or assign, pay to, or transfer to, or invest in the name of *William Henry Surman*, such additional sum in the 4 per cent. consolidated Bank annuities, as with the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. consolidated Bank annuities, or the stocks, funds, or securities into which the same should have been transferred, should, according to the market price thereof, be equal to the sum of 20,000*l.* sterling. And it was then agreed and declared between and by the parties to the said indenture, that the trustee, *William Henry Surman*, should stand and be possessed of and interested in the said sum of 20,000*l.*, upon and for such trusts, intents, and with, under, and subject to such powers, provisoes, agreements and declarations as were mentioned in another deed then already prepared, and bearing even date therewith. By the same indenture Lord *Milsington*, in consideration of the covenants, &c. on the part of Mr. *Colyear*, assigned to Mr. *Colyear* all the dividends which, after the death of Lord *Portmore*, would thenceforth, during the life of Lord *Milsington*, become due on the 38,483*l.* 9*s.* 3 per cent. consolidated annuities.

The second deed, after reciting the above-mentioned deed of even date, proceeded to declare the trusts upon which *William Henry Surman* should hold the sum of 20,000*l.* when it should be transferred to him. These

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trusts were for the benefit of the natural daughters of Lord *Milsington*, and contained provisions for their maintenance during their infancy, and contemplated their marriages, which marriages were provided to be with the consent of Lord *Milsington* and also of Mr. *Colyear;* and there was at the end of the deed a proviso that it might be lawful for Lord *Milsington* and Mr. *Colyear*, during their joint lives, by any deed or deeds, instrument or instruments, to revoke, and annul, and make void all or any of the trusts, powers, or authorities thereinbefore contained of the said trust monies, &c., or any of them, and to declare any new or other trusts, powers, or authorities of the same, which they, the said *Thomas Charles* Viscount *Milsington* and *Brownlow Charles Colyear*, should think proper, "so as the same new trust be for the use, benefit, interest, or security of the four natural daughters, or either of them, but not to deprive the whole of them of the settlement or provision thereby made, and intended to be made."

By the third indenture, made between Lord *Milsington* of the one part, and Mr. *Colyear* of the other part, after reciting the former arrangement, and reciting that Mr. *Colyear* had advanced a considerable sum towards the payment of the debts of Lord *Milsington*, and that he had agreed to enter into security for the payment of debts to a much larger amount; and reciting that it was the intention of *Brownlow Charles Colyear*, out of the natural love and affection which he had and bore towards *Thomas Charles* Viscount *Milsington*, and in consideration of the due and strict observance and performance by the said *Thomas Charles* Viscount *Milsington* of the covenants, conditions, and agreements contained and expressed in the indenture of trust of even date, to advance the money necessary to complete such repurchase or exoneration as aforesaid, and such sum

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sum or sums of money as should be necessary for paying off and discharging such of the debts of *Thomas Charles* Viscount *Milsington*, or such part or parts thereof respectively as were immediately pressing for payment, and also to become surety for *Thomas Charles* Viscount *Milsington*, or otherwise become bound, for the due payment of the said debts of *Thomas Charles* Viscount *Milsington*, or the unpaid part or parts thereof, to such of his creditors as required additional security; and ultimately to pay such several securities, and the full amount thereof, and all interest and expenses thereon, when such securities should become due and arrive at maturity, it being his wish and intention that all the said sum or sums of money which he, *Brownlow Charles Colyear*, had already, or should or might pay or advance, for or on account of the said charge to the said *Alexander Bruce*, or the said several debts of *Thomas Charles* Viscount *Milsington*, or of the interest or costs, charges, or expenses thereof, should be solely borne or paid by himself *Brownlow Charles Colyear;* and also reciting that, in pursuance and part performance of the said agreement, he, *Brownlow Charles Colyear*, had paid the sum of 20,514*l.* 7*s.* 10*d.* in part discharge of the debts of *Thomas Charles* Viscount *Milsington;* and that, in pursuance and further performance of the said agreement on the part of the said *Brownlow Charles Colyear*, he, *Brownlow Charles Colyear*, had, together with *Thomas Charles* Viscount *Milsington*, executed several deeds, bonds, or obligations, and made and signed several bills of exchange and securities for securing such of the aforesaid debts of *Thomas Charles* Viscount *Milsington*, with interest for the same; it was witnessed that he, *Brownlow Charles Colyear*, covenanted with *Thomas Charles* Viscount *Milsington* that, on condition of Viscount *Milsington* fully and faithfully performing all and every the covenants,

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nants, clauses, and conditions in the indenture of trust of even date on his part, he, *Browlow Charles Colyear*, would pay the several particular debts therein mentioned.

Shortly after the date of these deeds, and in *February* 1819, Mr. *Colyear* died. His father, Lord *Milsington*, under his will became entitled to all his property, and became his legal personal representative.

A sum of 26,000*l.*, part of Mr. *Colyear*'s estate, had come to the hands of Mr. *Surman*, the trustee named in the deed of arrangement. In *November* 1820, a bill was filed on behalf of the natural children of Lord *Milsington*, praying that 20,000*l.*, part of it, might be paid or applied upon the trusts of the arrangement of the 19th of *August* 1818, and there was also a prayer for payment out of the general assets. This bill was dismissed by Sir *Thomas Plumer* on the 1st of *August* 1823, on the ground that, by the deeds, the 19,350*l.* 5*s.* 9*d.* stock was the fund intended as a provision for the natural daughters, and that Mr. *Colyear*'s intention was only to increase that to the value of 20,000*l.*, and that there was no sufficient evidence to shew that he ever appropriated, or made his general assets liable to the appropriation of 20,000*l.*, independently of the settled 19,350*l.* 5*s.* 9*d.* stock.

In 1825, Lord *Milsington*, having then become Earl of *Portmore*, commenced proceedings against the assignees of *Bruce* to vacate the deed of 14th *March* 1810. Ultimately, in that suit, the deed was set aside (*a*) as an assignment, and 11,362*l.* 1*s.* 1*d.* having been found due to the assignee of *Bruce*, and paid, the 19,350*l.* 5*s.* 9*d.* stock

(*a*) See *The Earl of Portmore* v. *Taylor*, 4 *Sim.* 182.

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stock original 4 per cent., reduced to $3\frac{1}{2}$ per cent., was set free, and was standing, at the hearing of this demurrer, in the names of the deceased trustees of the settlement. The last surviving trustee was the late Earl of *Mulgrave*, whose representatives were the two first Defendants on the record.

Mr. *Tinney*, Mr. *Kindersley*, and Mr. *David James*, in support of the demurrer.

The agreement between the late Earl of *Portmore* and Mr. *Colyear*, which this bill seeks to have carried into effect, was an executory agreement for which there was no consideration either valuable or meritorious, and which this Court, upon principles now fully established, will not execute. Nothing was done in respect of Mr. *Bruce*'s security in the lifetime of Mr. *Colyear*, and the foundation of the arrangement, therefore, failed. The Court will not assist a volunteer by executing an imperfect covenant or gift; thus in *Colman* v. *Sarrel* (*a*) where there was a voluntary assignment of stock by deed, but no actual transfer of the stock, the Court refused to interfere in favour of the volunteer. If a trust be actually executed either by a conveyance of the legal estate for the benefit of the *cestui que trust*, though without consideration, or by some perfect act constituting the trust, the Court will enforce the rights of the party claiming the equitable interest: *Ellison* v. *Ellison* (*b*), *Ex parte Pye*, *Ex parte Dubost*. (*c*) In this case the contract is not only executory, but purely voluntary, there not being even a meritorious consideration for it, for in law a natural child is a mere stranger, and in this respect equity follows the law: *Fursaker* v. *Robinson*. (*d*) Where a promise is made by

(*a*) 1 *Ves.* jun. 50.
(*b*) 6 *Ves.* 656.
(*c*) 18 *Ves.* 140.
(*d*) *Pr. in Ch.* 475.

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by one person to another for the benefit of a third, or where a contract is entered into between two persons for the benefit of a third person, and that third person is a mere stranger to the consideration, he is neither at law nor in equity entitled to the benefit of the promise or agreement. In some cases where there was the consideration of blood between one of the contracting parties and the third person, such third person has at law been held entitled to sue, as in *Dutton* v. *Poole* (*a*), where a father being about to cut down timber to the amount of 1000*l.* as a portion for his daughter, the son, upon whom the estates afterwards descended, induced him to refrain from so doing by a promise to pay the 1000*l.* to the daughter, and an action having been brought by the daughter together with her husband against the son, it was held to be maintainable on the ground of the near relation between the father, to whom the promise was made, and his daughter. In that case, however, the Court, in giving judgment, admitted that the decision would have been otherwise, if the person, not a party to the engagement, had been a mere stranger; and it has been repeatedly decided at law, that a stranger to the consideration cannot maintain an action of *assumpsit*: *Bourne* v. *Mason* (*b*), *Crow* v. *Rogers.* (*c*) The same principle prevails in equity; thus where *A.*, a trader, entered into partnership with *B.*, and brought his stock in trade into the partnership, and by the partnership articles it was agreed that the joint trade should pay the creditors of *A.* named in a schedule, it was held that a separate creditor of *A.* named in the schedule had no claim against the joint trade under these articles. *Ex parte Williams.* (*d*) Lord *Eldon* in that case alludes to a case in one of the old reports (*e*) where *A.* by deed

(*a*) 1 *Ventr.* 318. 332.; and 2 *Lev.* 210.
(*b*) 1 *Ventr.* 6.
(*c*) 1 *Str.* 592.
(*d*) *Buck.* 13.
(*e*) The case alluded to is *Gilby* v. *Copley*, 3 *Lev.* 138.

deed covenanted with *B.* that he, *A.*, would pay a sum of money to *C.* a stranger to the deed, who afterwards attempted to maintain an action of covenant against *A.*; and his Lordship observes, that whatever might be the law at the date of that report, such an action could certainly not be supported at the present time. In *Sutton* v. *Chetwynd* (*a*), it was decided that a covenant in marriage articles in favour of a stranger was merely voluntary, and not supported by the consideration of marriage. In *Johnson* v. *Legard* (*b*), which was sent to law, and upon which the Court of King's Bench returned its certificate before Sir *William Grant* pronounced his decision in *Sutton* v. *Chetwynd*, it was held that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary, and void against purchasers. In a case before the late Lord Chancellor of *Ireland*, the Court decreed specific performance of a postnuptial agreement by which a father undertook to make provision for a child, that being a contract founded on a meritorious consideration: *Ellis* v. *Nimmo.* (*c*) No case has hitherto gone so far as that decision; but it is inapplicable to the present case, no meritorious consideration being raised by the relation between a father and his natural children.

Neither can it be successfully contended that the Plaintiff is entitled to claim as a creditor against the estate of Mr. *Colyear* or of the late Earl of *Portmore* under the deeds of arrangement between those parties. That arrangement was in its nature executory and revocable; and if the Plaintiff and her sisters had even been

(*a*) 3 *Mer.* 249. *Turn. & Russ.* 296.; affirmed on appeal by the House of Lords. See cases collected in *Lincoln's Inn* library, vol xxv. pt. 4. p. 554.

(*b*) *Turn. & Russ.* 281.

(*c*) *Lloyd & Goold*, 333.

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been creditors for valuable consideration, they could not have enforced their claims under instruments of this description to which they were no parties: *Wallwyn* v. *Coutts* (*a*), *Garrard* v. *Lord Lauderdale.* (*b*) The arrangement was only to take effect at the request of Lord *Milsington;* it was in his option, therefore, whether he would give effect to it, and in point of fact that request was never made.

Mr. *Pemberton* and Mr. *Wright, contrà.*

If the defence set up by the late Earl of *Portmore* against the claim of his natural children — a defence, involving a violation of obligations which ought to have been binding upon his honour and his conscience — be nevertheless such as, upon a technical principle recognised by the law of this Court, must prevail against the Plaintiff and her sisters, the Court will no doubt deeply regret the necessity of coming to such a conclusion. But the law of this Court does not, as we contend, impose upon it so painful a necessity. By the instruments under which the Plaintiff claims, a trust was declared, and the relation of trustee and *cestui que trust* so constituted that the Court will carry the agreement into effect. The stock is still standing in the names of the trustees of the original settlement, and the real question is for whom are they trustees? We contend that they are trustees for the natural daughters of the Earl of *Portmore.* Natural children may be the objects of settlement; and where an agreement is entered into by a father to make a provision for a natural child, either to save the honour of a family, or for other reasonable cause, it is so far from being true that this Court regards natural children as mere strangers,

(*a*) 3 *Mer.* 707. (*b*) 3 *Sim.* 1.

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strangers, that it will, if possible, decree a specific performance of such an agreement. In *Stapilton* v. *Stapilton* (*a*), where the foundation of the agreement was the illegitimacy of a reputed eldest son, Lord *Hardwicke* observed that the two sons in that case were of the same blood of the father equally, though not so in the notion of the law; and his Lordship did not consider the natural son as a mere volunteer, but decreed specific performance of the agreement on the ground of its reasonablensss as a family arrangement. The cases at law which have been cited for the purpose of shewing that a third person, not a party to a contract, but for whose benefit the contract had been entered into, cannot sue upon it, even if they had not been shaken by more modern authorities (*b*), can have no application to a case where relief is sought upon grounds peculiar to the equitable jurisdiction of this Court. In equity it has been decided that a person, though a volunteer, and who would, therefore, be considered at law a stranger to the consideration, may enforce a trust which has been created for his benefit, provided every thing has been done on the part of the person creating the trust, that is necessary to evidence his intention of conferring a benefit on the volunteer. In *Fortescue* v. *Barnett* (*c*), a person made a voluntary assignment to trustees by deed of a policy of assurance, for the benefit of his sister and her children; but he kept the policy in his possession, and having afterwards surrendered it to the office for a valuable consideration, he was compelled, upon a bill filed to have the trust carried into execution, to replace the value of the policy for the benefit of his sister and her children. There was no consideration

(*a*) 1 *Atk.* 3.

(*b*) *Marchington* v. *Vernon*, 1 *Bos. & Pull.* 101. *n.*

(*c*) 3 *Mylne & Keen*, 36.

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ation for the trust in that case, and the legal title remained in the grantor; yet the Court held that the delivery to the trustees of the deed assigning the policy, was sufficient to complete the act of bounty, and to give an equitable interest to the *cestui que trust*, entitling her to the relief prayed by her surviving trustee.

If the natural children of the Earl of *Portmore* are not entitled to the specific funds in the hands of the trustees, they are entitled to come as creditors against the assets of Mr. *Colyear* and of his father. Mr. *Colyear* placed himself *in loco parentis* towards the Plaintiff and her sisters, and the provision made for them, under the deed of arrangement, is equivalent to a provision in marriage articles. That Mr. *Colyear* considered he was placing himself in that character towards the natural daughters of the Earl of *Portmore* may be inferred from the stipulations by which it is provided that they should not marry without the consent of Mr. *Colyear*. In *Goring* v. *Nash* (*a*), and in *Osgood* v. *Strode* (*b*), the Court gave effect to stipulations in marriage articles for the benefit of collaterals. As to the argument that the agreement was only to be carried into effect upon the request of Lord *Milsington*, and that it was inoperative, if that request was never made, it is a rule in equity that, where a party whose consent is necessary acquires an adverse interest, the Court will interfere and compel consent.

Mr. *Tinney*, in reply.

Aug. 5. *The* MASTER *of the* ROLLS (after stating the facts).

In support of this demurrer it is alleged that the Plaintiff is merely a volunteer; that, being a natural child

(*a*) 3 *Atk.* 186. (*b*) 2 *P. Wms.* 245.

child, her claim is founded on no consideration either valuable or meritorious, and, consequently, she is entitled to no relief in this Court.

It is admitted that, as between Lord *Milsington* and Mr. *Colyear*, there was sufficient consideration passing from one to the other, but it is argued that it was in their power to put an end to the arrangement when they pleased; that a natural child of one of the parties must be considered as a mere stranger, and that the Court will not interfere for a stranger.

It is further argued, that this is a bill for the specific performance of a covenant upon which there is no legal right, and nothing could be recovered at law.

For the Plaintiff, it was contended that the deeds amounted to a declaration of trust. The stock was, as it still is, standing in the names of the trustees of the marriage settlement. The persons equitably entitled were Lord *Milsington*, under him *Bruce*, and in remainder after him Mr. *Colyear* and Lord *Milsington*; and Mr. *Colyear* agreed to redeem or get rid of *Bruce*, and then to apply the fund for the benefit of the natural daughters; and the argument is, that this agreement is so expressed as to amount to a declaration of trust.

After the most careful consideration of the deed, I cannot think that this is the effect. Lord *Milsington* and Mr. *Colyear* expressed clearly their object and intention: what they meant to do in the event of the fund being repurchased, and what Mr. *Colyear* should and would do at the request of Lord *Milsington*. The intention was not that the present trustees should be trustees for the natural daughters, but that, in a certain event, Mr. *Colyear*, at the request of Lord *Milsington*, would procure

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a transfer to Mr. *Surman* in trust for the natural daughters; but the whole is executory and nothing concluded.

The next argument used is that, even if there be no declaration of trust, there may nevertheless be a right to enforce the covenants against the estates of both father and son, inasmuch as the son, by the provisions of the deed, and particularly by the stipulation for his consent to the marriage of his natural sister, had placed himself, as towards them, in *loco parentis;* and considering them as his adopted children, there may, it is said, be meritorious consideration to give them a right to enforce the covenants. But I cannot come to that conclusion; and I apprehend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other. The misfortune for the natural children was, that Mr. *Colyear* died before the executory agreements were carried into effect.

Demurrer allowed.

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Dec. 9, 10.
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Among the trusts of a settlement, (the subject of the settlement being property limited to the separate use of the wife,) it was provided, that the trustees should effect a policy of assurance to the amount of 3000*l.* on the life of the wife, and annually pay the premium out of the trust-money during the life of the wife, and stand possessed of the assurance in trust after the decease of the wife to invest the 3000*l.* when received, and pay the interest to the husband for his life, if he should survive the wife, and after the decease of the husband to pay the 3000*l.* to such person or persons as the wife should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the persons entitled under the statute of distributions.

There were no children of the marriage, and the wife, having survived her husband, and being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, and by his will appointed *G.* his executor and residuary legatee. *G.* continued to pay the premium, and, on the death of the assured, received the value of the policy.

Held, on a bill filed by the next of kin of the wife against *G.* and against the executor and residuary legatee of the wife, that the assignment was valid, and that *G.* was entitled to the value of the policy.

BY an indenture of settlement, dated the 3d day of *February* 1808, and made in contemplation of a marriage between *Mary Procter*, widow of *Michael Procter*, of the first part; *John Martin*, the intended husband, of the second part; and *Thomas Brown* and *Henry Fowke*, of the third part, reciting the will and codicil of *Michael Procter*, under which *Mary Procter* was entitled to the several legacies and interests in the testator's real and personal estates therein mentioned; and reciting the death of the testator, and that an agreement had been entered into between the testator's nephew and *Mary Procter*, to the effect therein mentioned; and also reciting that, upon the treaty for the intended marriage between *John Martin* and *Mary Procter*, it had been agreed that all the real estate to which *Mary Procter* was entitled for her life under the will and codicil, or by the agreement, and the interest given by the will to her for life in the sum of 4500*l.* thereby directed to be, and then lent at interest, in the manner therein mentioned, and also the sum of 400*l.* 3 per cent. consolidated Bank annuities by her purchased as in the indenture mentioned, and also the articles

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cles of furniture therein described, should be vested in *Thomas Brown* and *Henry Fowke* upon the trusts thereinafter mentioned, it was witnessed that, in pursuance of the said agreement of marriage, and in consideration thereof, and for making a certain provision for *Mary Procter* during the continuance thereof, and for the nominal consideration therein mentioned, she, *Mary Procter*, with the privity and consent of *John Martin*, granted, bargained, released, and confirmed to *Thomas Brown* and *Henry Fowke*, their executors, administrators, and assigns, all the messuages, lands, tenements, and hereditaments therein described, to which *Mary Procter* was entitled for her life under the said will and codicil, upon the trusts thereinafter declared thereof. And it was further witnessed that *Mary Procter* assigned to the same trustees all the interest, dividends, and annual produce by the will bequeathed to *Mary Procter* for her life, to arise from the said sum of 4500*l.* thereby bequeathed to *Thomas Brown* and *Henry Fowke*, upon the trusts therein mentioned, and all the articles of furniture and other effects bequeathed by the will, upon trust that *Thomas Brown* and *Henry Fowke*, their executors, &c., should stand and be seised and possessed of the messuages, lands, and other premises thereby released, and the interest, dividends, and effects in the proviso thereinafter expressed, and other premises thereinafter assigned, and also the said sum of 400*l.* 3 per cent. consolidated Bank annuities, in trust for *Mary Procter* until the intended marriage, and after the solemnisation thereof, as to the effects mentioned in the proviso thereinafter contained, upon trust to permit and suffer *Mary Procter*, at all times during her intended intermarriage, to hold, use, occupy, enjoy, and dispose of the same, and every of them, in such manner as she should think proper, and for her sole benefit, free from the debts, control, and interference of *John Martin*, her intended husband;

husband; and as to the said sum of 400*l.* 3 per cent. consolidated Bank annuities, upon trust for such person or persons, and for such intents and purposes, as *Mary Procter*, by any writing to be signed by her, and attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of a last will, to be by her signed and published in the presence of, and attested by two or more witnesses, should, notwithstanding her intended coverture, direct or appoint; and as to the dividends and annual produce of the said 400*l.* 3 per cent. consolidated Bank annuities, in default of or until such appointment as aforesaid, and as to the yearly rents, issues, and profits of the messuages, lands, &c. thereinbefore released, and the interest and dividends thereby assigned of the trust sum of 4500*l.*, and of the stocks, funds, or securities, in or upon which the same should be laid out and invested, upon trust during the life of *Mary Procter*, to pay the same rents and profits, dividends and interest, unto such person or persons, and for such intents and purposes, as *Mary Procter*, by any writing or writings to be signed with her own hand, should, notwithstanding the intended coverture, from time to time direct or appoint, and until and in default of such appointment, into her own hands for her own sole and separate use and benefit, independent of, and without being subject to the debts, control, or interference of the said *John Martin*; and also upon trust, in case *Mary Procter* should make any savings or accumulations of the rent and dividends, to invest the same in manner therein mentioned. And it was thereby declared and agreed, that the receipts in writing of *Mary Procter*, or any such her appointee or appointees as thereinbefore mentioned, should, notwithstanding her intended coverture, be good and sufficient discharges for all rents, dividends, and

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other monies to be paid to her or them, under any of the trusts; and in case any part of the rents, profits, dividends, &c., and other monies, or any savings or accumulations therefrom, or all or any part of the effects mentioned in the proviso thereinafter contained, or of the said sum of 400*l.* 3 per cent. consolidated Bank annuities, should remain undisposed of at the death of *Mary Procter*, and there should be issue of the marriage, upon further trust to pay, transfer, or assign the same rents, profits, interest, dividends, accumulations, and other premises, unto all and every the children and child of *John Martin* by *Mary Procter*, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age, or marry, to be equally divided between such children, if more than one, and if but one, then the whole to such one child; and if there should be no such issue, then in trust, after the decease of *Mary Procter*, and such default of issue as aforesaid, to assign or transfer, and pay the last-mentioned trust-money, stocks, funds, securities, dividends, and accumulations respectively, to such person or persons (including the said *John Martin*, if she should think proper), for such intents and purposes as *Mary Procter*, by any writing to be signed by her, and attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of a last will, should in manner therein mentioned direct or appoint; and in default of such direction or appointment, or so far as the same, if incomplete, should not extend, to such person or persons as would have been entitled thereto as her next of kin, at the time of such her decease, and such default of issue as aforesaid, under the statute for the distribution of intestates' personal effects, if she, *Mary Procter*, had then died sole and intestate, to the utter

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utter exclusion of the said *John Martin*. And it was further agreed between *Mary Procter* and *John Martin*, that the said *Thomas Brown* and *Henry Fowke* should, within two calendar months after the solemnisation of the intended marriage, make an assurance upon the life of *Mary Procter* for the sum of 3000*l*., in the Equitable assurance office, and when the assurance should be effected in their names, that *Thomas Brown* and *Henry Fowke*, and the survivor of them, and the executors, administrators, or assigns of such survivor, should annually pay out of the said trust-money the regulated premium of assurance, for and during the life of *Mary Procter*, and stand possessed of the said assurance in trust, from and after the decease of *Mary Procter* and the said assurance office should have paid the said sum of 3000*l*., to place out the said sum of 3000*l*. at interest upon real or government security, and to pay the interest or dividends thereof to *John Martin* for his life, if he should survive *Mary Procter;* and from and after the decease of *John Martin*, then in trust to pay the said sum of 3000*l*. to such person or persons, and in such way and manner as *Mary Procter* should, by her last will and testament, attested by two witnesses or more, direct or appoint, notwithstanding her intended coverture; and in default of such last will and testament, to pay the said sum of 3000*l*. to the persons entitled under the statute of distribution of intestates' personal estate. Provided nevertheless, that *Mary Procter* should and might, if she pleased, in and by her last will and testament, give and bequeath the said 3000*l*., or any part thereof, to her intended husband *John Martin* absolutely, if he should survive her.

The marriage took effect, and the trustees, in pursuance of the proviso in the settlement, effected a policy of

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assurance to the amount of 3000*l.* on the life of *Mary Martin*, at an annual premium of 144*l.* 13*s.*, bearing date the 1st *April* 1808.

John Martin died in the month of *March* 1817, leaving *Mary Martin*, his widow, surviving him. There was no issue of the marriage.

By an indenture of assignment dated the 8th of *April* 1817, and made between *Henry Fowke*, who had survived his co-trustee, of the first part, *Mary Martin* of the second part, and *Philip Godsal*, the father of the Plaintiff, of the third part, reciting, amongst other things, the death of *John Martin*, whereby the intent and purpose of making and effecting the said assurance for a provision for *John Martin*, in case he should have survived *Mary Martin*, had determined and ceased; and that *Ann*, the wife of *Philip Godsal*, was one of the sisters of *Mary Martin;* and that *Philip Godsal* was also cousin to *Mary Martin;* and that *Mary Martin*, in consequence of the decease of *John Martin*, was unwilling any longer to continue the said assurance, and to pay the annual sum to grow due from time to time as the premium for the same, and had proposed to *Philip Godsal* to assign the policy to him, his executors, administrators, and assigns, which *Godsal* had agreed to accept, and had accordingly paid, or agreed to pay to the said Equitable assurance office the sum of 144*l.* 13*s.* for the premium thereon due on the 1st day of *April* then instant, it was witnessed that, in consideration of the premises, and also of the natural love and affection which she, *Mary Martin*, had for and towards her cousin *Philip Godsal*, and her sister *Ann*, his wife, and for the nominal consideration therein mentioned, he, *Henry Fowke*, at the special instance and request,

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request, and by the direction and appointment of *Mary Martin*, bargained, sold, assigned, and transferred, and *Mary Martin* granted, bargained, sold, ratified, and confirmed unto *Philip Godsal*, his executors, administrators, and assigns, all that policy of assurance granted by the society for Equitable assurance unto *Thomas Brown*, deceased, and *Henry Fowke*, for assuring to them, their executors, &c., the sum of 3000*l.*, to be paid by the said assurance office upon the death of her, *Mary Martin*, and also the sum of 3000*l.*, thereby assured to be paid; and all and every other sum and sums of money whatsoever, which were or should become due or payable for, or in respect of, or on account of the said policy of assurance; and also all the estate, right, title, &c., of him, *Henry Fowke*, as surviving trustee of the said indenture of settlement, and also of her, *Mary Martin*, her executors, administrators, and assigns, to and out of the same policy of assurance, monies, and premises thereby assigned, and every part thereof, to hold, receive, and enjoy the same, to him, *Philip Godsal*, his executors, administrators, and assigns, to and for his and their own use and benefit, and as and for his and their own absolute property for ever.

Henry Fowke, the surviving trustee, died in the lifetime of *Mary Martin*.

Philip Godsal continued to pay the annual premium upon the policy of assurance from the date of the assignment of the 8th of *April* 1817, until his death. By his will, dated the 4th of *April* 1818, he bequeathed the residue of his real and personal estate to his son *Philip Lake Godsal*, the Plaintiff; and his will was proved by the Plaintiff and *Charles Hatchett*, two of the executors named therein. The annual premiums paid by

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by *Philip Godsal*, in his life-time, amounted in the whole to the sum of 1446*l.* 10*s.*

Mary Martin died in the month of *March* 1835, having made her will, dated the 2d of *August* 1834, whereby she devised and bequeathed all her real and personal estate, and all the residue of the produce of her funded property, monies, and securities for money, and other personal estate and effects not thereinbefore disposed of, to her nephew, the Defendant, *Edward Humphrey Brown*, whom she appointed her executor, and by whom her will was duly proved.

The Plaintiff paid the annual premium upon the policy from the death of his father until the death of *Mary Martin*, amounting to the sum of 1157*l.* 4*s.*; and upon her decease, he received from the Equitable Assurance Company the sum of 6570*l.*, being the sum of 3000*l.* originally secured, together with 3570*l.*, the amount of the bonuses which had from time to time been added to the policy.

The bill was filed by the Plaintiff against the several next of kin, and the executor and residuary legatee of *Mary Martin*, and it prayed that the sum of 6570*l.*, received by the Plaintiff from the Equitable Assurance Society, might be declared to belong beneficially to the Plaintiff, or to the next of kin, or to the executor of *Mary Martin*; and that, if the decision of the Court should be in favour of the Plaintiff, the Plaintiff might be declared entitled to retain the same for his own use and benefit; but if the decision of the Court should be adverse to the Plaintiff, then that the Plaintiff might be declared entitled to deduct the sums of 1446*l.* 10*s.* and 1157*l.* 4*s.*, being the amount of the premiums paid by his father, and himself respectively, with interest, from the

the sum of 6570*l.*; or, if he was not entitled to deduct the same, then that the executor of *Mary Martin* might be decreed to pay the same, with interest, to the Plaintiff.

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Mr. *Pemberton*, Mr. *Barber*, and Mr. *Walford*, for the Plaintiff.

On the death of *John Martin*, the purpose for which the policy of assurance was effected under the proviso in the settlement failed, and Mrs. *Martin* had a clear right to dispose of the policy, or assign it, as she thought proper. Upon the true construction of the settlement, as to the whole property which was the subject of it, the ultimate trust for the next of kin was only intended to take effect, in case Mr. *Martin* should survive his wife, and there should be no children of the marriage, and no appointment should be made by the wife. The right of the Plaintiff in this suit is to be tried by the question, whether any person claiming under the settlement, could, upon the death of Mr. *Martin* without children of the marriage, have successfully filed a bill against Mrs. *Martin* and her trustee, to compel them to keep up the policy. It is clear that no such bill could have been sustained. The purposes of the settlement were to secure the settled property for the sole and separate benefit of Mrs. *Martin* during the continuance of the coverture, for the benefit of the husband if he should survive his wife and his wife should think fit to make an appointment in his favour, and for the children of the marriage. The wife, the husband, and the children of the marriage were the only persons within the consideration of the settlement; and, upon the death of the husband without issue, Mrs. *Martin* acquired the power of disposing absolutely of the whole of the settled property. The power of disposition given to the wife under this settlement must, in the events which happened, of her surviving

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viving her husband and there being no children of the marriage, be considered as an absolute gift; and there are strong authorities in support of that proposition: *Hales* v. *Margerum* (*a*), *Langham* v. *Nenny* (*b*). In the clause, directing the trustees to make an assurance to the amount of 3000*l.* on the life of Mrs. *Martin*, there is no limitation in favour of children of the marriage, the object of that clause being solely to secure a provision for the husband in case he should survive his wife; and the trustees are accordingly directed, in that event, to invest the 3000*l.*, when paid by the assurance office, and pay the interest to the husband for his life, and after his decease to such person or persons as she should by will appoint, notwithstanding her intended coverture. The power of appointing, therefore, was confined to the coverture; and in the event which actually happened of the wife surviving her husband, she acquired an absolute interest in the value of the policy. The agreement between the husband and wife, upon which the proviso for effecting the policy of assurance was founded, was purely executory. They might have abandoned it, at any time during their joint lives, by directing the trustees to discontinue the payment of the annual premium, and, on the death of the husband, Mrs. *Martin* was at liberty to keep up or abandon the policy, as she thought proper. If, however, the Court should be of opinion that Mrs. *Martin* did not acquire an absolute interest in the value of the policy, a question may arise whether her will, which is attested by two witnesses, will not operate as an appointment.

The Court will give effect to the intention of the settlement; for "the intention of the settlement," as was emphatically observed by Lord *Thurlow*, "is the truth and

(*a*) 3 *Ves.* 299. (*b*) *Ibid.* 467.

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and honour of the case:" *Woodcock* v. *The Duke of Dorset* (*a*), *Bulmer* v. *Jay* (*b*), *Arundell* v. *Arundell.* (*c*) Now it was clearly not the intention of the proviso this settlement, that the trust in favour of the next of kin should take effect in any event, except the event which has not happened, namely, that of the husband surviving the wife. There is no trust to keep up the policy after the death of the husband, and the interest of the next of kin is an interest given to them after the death of the husband, if he should survive, but not after his death in the lifetime of the wife. In the late case of *Hawkins* v. *Hawkins* (*d*), where property was settled on the wife and her husband, and their issue, and, in default of issue, to the wife's next of kin, and the wife, who was illegitimate, died without issue, it was held that it was the intention of the settlement to exclude the husband only in the event of there being next of kin; and as there were no next of kin, the title of the wife was unaffected by the ultimate limitation, and must prevail against the claim of the Crown. In *Arundell* v. *Arundell*, where a jointress had accepted the security of stock, which became deficient, in lieu of an annuity charged under her settlement upon real estate, Sir *John Leach* relieved the jointress, even against her own release to the trustees, because it was against the intention of the settlement, and of the party executing the release, that she should receive less than the full amount of her annuity.

There are cases in which trustees have been held to be justified in destroying contingent remainders, and have even been directed by the Court to do so. In this case the *cestui que trust* and trustee have joined in assigning a part of the trust property; but who has a right

(*a*) 3 *Bro. C. C.* 569.
(*b*) 4 *Sim.* 48.
(*c*) 1 *Mylne & Keen*, 316.
(*d*) 7 *Sim.* 173.

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right to complain of that act? Could the next of kin, who are strangers to the consideration of the settlement, have filed a bill against the trustee for a breach of trust, and obtained relief in this Court? The authorities shew that they could not: *Sutton* v. *Chetwynd* (*a*), *Johnson* v. *Legard.* (*b*) If the agreement, which was the foundation of the trust for effecting the policy, was, as between the husband and wife, executory, and might have been abandoned during their joint lives, it follows, as a necessary consequence, that there could be no executed trust for the next of kin. The trust in their favour depended entirely for its completion upon the keeping up of the policy — upon an act which the *cestui que trust*, who was the only surviving purchaser under the settlement, and the trustee, concurred in declining to perform. The next of kin were not purchasers under the settlement, but mere volunteers, in whose favour the Court will not interfere.

Mr. *Spence*, for the executor, who was also the residuary legatee of Mrs. *Martin*, submitted that the will of Mrs. *Martin* would operate as an appointment of all the property of which she had the power of disposing; and that, according to the true construction of the settlement, the value of the policy was to be considered as part of the savings and accumulations out of the rents issues, and profits of the estates and effects settled by the indenture of settlement. The Defendant *Brown*, therefore, as personal representative and residuary legatee of Mrs. *Martin*, would, either by virtue of the appointment, or, if the will should not be considered as an appointment, under the gift of the residue of the testatrix's general estate, be entitled to the 6570*l.* received by the Plaintiff from the assurance office.

Mr.

(*a*) 3 *Mer.* 249. (*b*) *Turn. & Russ.* 281.

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Mr. *Tinney* and Mr. *Piggott*, for the next of kin.

It is settled that a general disposition of property by will cannot operate as a testamentary appointment, unless there is a reference to the power, or an apparent intention to execute the power. *Mary Martin*, by her will, makes an appointment, by virtue of her power, of the sum of 500*l.*, and then disposes of her own residuary estate. There having been no appointment, therefore, in this case of the 3000*l.* secured by the policy, the next of kin are entitled under the settlement. There is no foundation for the argument, that the clause providing for the assurance on the life of Mrs. *Martin* contemplated only the event of her dying in the lifetime of her husband. That clause contains a positive direction to the trustees to keep up the policy, without reference to the event of the wife surviving the husband, or the husband surviving the wife. The trustees are to stand possessed of the assurance, after the decease of *Mary Martin*, upon trust to pay the interest of the 3000*l.* to the husband if he should survive his wife; and, after his decease, to pay the 3000*l.* to such person or persons as *Mary Martin* should by will appoint, notwithstanding her coverture, and, in default of appointment, to the next of kin. The words "notwithstanding her coverture," do not imply that the appointment was only to be made during the coverture; but mean simply that the coverture should be no obstacle to her making a testamentary appointment. The trustee was clearly guilty of a breach of trust in concurring with the tenant for life to make an assignment of the subject of the trust, over which the tenant for life had only a power of appointment by will. There is nothing, in the language of this settlement, to shew that there was an intention to exclude the next of kin, in the events which have happened, from the benefit of the ultimate limitation.

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limitation. There is nothing absurd or irrational in that limitation; on the contrary, if *Mary Martin* failed to make a testamentary appointment, it was reasonable enough, and consistent with the apparent intention of the settlement, that her next of kin should be entitled. The cases cited, therefore, for the purpose of proving how far the Courts have gone in giving effect to the intention with which a settlement has been framed, cannot be used as authorities against the claims of the next of kin under this settlement.

It is said that Mrs. *Martin*, upon the death of her husband, acquired the absolute interest in the policy, but the language of the settlement affords no ground for that conclusion. Under the trusts of this settlement Mrs. *Martin* took nothing but a life-interest with a power of disposition over the trust-fund. In *Anderson* v. *Dawson* (*a*), the limitations of the settlement were, in many respects, similar to those in the present case. By that settlement it was agreed to transfer a sum of stock, the property of the wife, into the names of trustees, in trust to pay the dividends to the wife for her separate use during her life; and, after her death, in trust for the husband; and, after the death of the survivor, in trust to transfer the same to such person as the wife should appoint by her will, notwithstanding her coverture; and, if she should die without making any appointment, and her husband should be then dead, then in trust for her next of kin according to the statute of distributions: the wife survived her husband, and conceiving herself to be the absolute owner of the stock, she filed a bill against the trustees to have the stock transferred into her own name. But Sir *William Grant* decided that she was entitled only for life, with

(*a*) 15 *Ves.* 532.

with a power of disposition by will, and dismissed the bill.

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The trust, created by the proviso for effecting the assurance, was not executory, but a trust executed in the trustees, the parties creating the trust having divested themselves of all control over the subject of it, and no act requiring to be done, on their part, in order to complete the execution of the trust. The trust being created, the trustees were bound to continue the payment of the premium out of the settled funds for the benefit of the *cestuis que trust*. Where no act is wanting on the part of one person making or directing a declaration of trust for the benefit of another, the trust is executed, and the person in whose favour it is so executed, though a volunteer, may obtain the benefit of it in this Court; but where the act by which the trust is attempted to be created is imperfect, or any thing is wanting to complete the legal title of the trustee — in other words, where the trust is executory, the Court will give no assistance to a volunteer. This distinction is well established by the authorities. Thus in *Ex parte Pye*, *Ex parte Dubost* (*a*), a power of attorney sent to an agent abroad to transfer a *French* annuity to *A.* was held to be a complete declaration of trust for the benefit of *A.*, though the annuity was not actually transferred, because the person creating the trust had done every act in his power to complete it. So in *Wheatley* v. *Purr* (*b*), a direction by *A.* to her banker to carry a sum to an account in the joint names of *A.* as trustee for certain persons, and of those persons, was held to be a complete declaration of trust. But where the party creating a trust for the benefit of a volunteer does not put the trust-fund completely out of his control, as in the late case of *Colyear* v. *The Countess of Mulgrave* (*c*), where

(*a*) 18 *Ves.* 140. (*b*) 1 *Keen*, 551. (*c*) *suprà*, p. 81.

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where a father and son entered into an agreement, which was held to be executory, to make a provision for the natural daughters of the father, the Court will not assist the volunteer. If the trust is executed, no consideration is essential, and the Court will execute it though voluntary: *Sloane* v. *Cadogan.* (*a*) The cases which have been cited, therefore, for the purpose of shewing that the next of kin are strangers to the consideration of the settlement, are inapplicable. If the trust is created, it is not necessary that they should be within the marriage consideration. The want of consideration will not affect their rights in this Court under the executed trust, nor would it even affect their title as against subsequent purchasers, because the statute of *Elizabeth* does not extend to personal estate. As to the premiums paid by the Plaintiff since the assignment by *Mary Martin*, he is entitled to be indemnified either by the trustee, who concurred in making the assignment, or by the personal representative of *Mary Martin*.

Mr. *Pemberton*, in reply.

It is admitted that the next of kin are not purchasers within the marriage consideration, but mere volunteers under the settlement. Unless, therefore, the Court shall be of opinion that it was the intention of Mrs. *Martin* to bind herself to pay an annual premium of 140*l.*, after the failure of all the purposes for which the policy was effected, the Plaintiff is entitled to a decree in his favour. According to the argument of the other side, the intention of the settlement must prevail, and, if so improbable an intention cannot be reasonably imputed to Mrs. *Martin*, the claim of the next of kin fails. Admitting that the right of a volunteer to enforce a trust

(*a*) *Sugd. V. & P.* vol. ii. p. 580. 9th edit.

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trust in this Court will depend upon the question whether the trust is completely constituted, or is in its nature imperfect and executory — though the distinction insisted upon for the Defendants requires qualification — can any thing be more incomplete and executory than the attempt to constitute a trust by the effecting of a policy of assurance upon the life of an individual? In the very outset it is open to this contingency, that the office may refuse to accept the assurance. Supposing the proposal to the office upon the given life to be made by the trustees and accepted, there is the liability from year to year of the policy being avoided by an omission to pay the premium. If, on the decease of the person whose life is assured, the amount of the policy be paid, as in this instance, without opposition by the assurance office, the next step required by the trusts of this settlement is, that the trustees shall invest, in government stock, the sum received from the assurance office. That step has not been taken, because the trustee, before the period arrived for taking it, concurred with the only person who had a valuable interest in the trusts of the settlement in parting with the policy. It seems impossible to contend successfully that such a trust as this can be other than an incomplete and executory trust; and, if executory, the next of kin, who are admitted to be mere volunteers, cannot call upon the Court to carry it into execution.

On the following day, Mr. *Tinney* mentioned *Fortescue* v. *Barnett* (*a*), which he had omitted to cite in his argument, as a case shewing that a trust, created by a voluntary assignment of a policy of assurance upon the life of an individual, was completely within the doctrine,

(*a*) 3 *Mylne & Keen*, 36.

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doctrine, laid down by the Courts, with reference to executed trusts. In that case, a person made a voluntary assignment to trustees, by deed, of a policy of assurance upon his own life, for the benefit of his sister and her children. The deed was delivered to the trustees, but the policy remained in the possession of the grantor, who afterwards surrendered it for valuable consideration to the assurance office. Upon a bill, filed by the surviving trustee, it was held that the grantor was bound to replace the value of the policy and the bonuses which had accrued upon it, upon the ground that, on the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy.

Mr. *Pemberton* observed that, in the recent case of *Edwards* v. *Jones* (*a*), the present Lord Chancellor took occasion to make some observations on the case of *Fortescue* v. *Barnett;* and, though he expressed his acquiescence in the principle upon which that case was decided, it was clear that his Lordship entertained great doubt whether, upon the circumstances of that case, Sir *John Leach* came to a right conclusion. "Whether," said Lord *Cottenham*, "upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same ground, namely, that, if the transaction is complete, the Court will give it effect." In *Edwards* v. *Jones* the obligee of a bond signed a memorandum, indorsed upon the bond, purporting to be a voluntary assignment of the bond to a person to whom the bond was at the same time delivered. The Lord Chancellor, affirming the decision

(*a*) 1 *Mylne & Craig*, 226.

decision of the Vice-Chancellor, was of opinion that the gift was incomplete.

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The bill in this cause calls upon the Court to declare to whom a sum of 6570*l.*, received by the Plaintiff from the Equitable Assurance Office, belongs. It is claimed by the Plaintiff, by the next of kin of *Mary Martin*, deceased, and by her legal personal representative and residuary legatee, under the following circumstances:—

Michael Procter, the first husband of *Mary Martin*, devised and bequeathed certain real and personal estates to her for her life. Being entitled to this life-interest, and also to a sum of 400*l.* 3 per cent. annuities, she executed a settlement in contemplation of a marriage, afterwards solemnised, with *John Martin*. (His Lordship stated the settlement.)

There was no issue of the marriage; and, in *March* 1817, *John Martin* died, leaving *Mary Martin*, his widow, surviving him, and, soon afterwards, with the concurrence of Mr. *Fowke*, the surviving trustee, she disposed of the policy to her cousin, Mr. *Philip Godsal*, the Plaintiff's father; and by an indenture of assignment, dated the 8th day of *April* 1817, and made between *Fowke* of the first part, *Mary Martin* of the second part, and *Philip Godsal* of the third part, after reciting the settlement, the marriage, the effecting the policy, and the death of *John Martin*, "whereby," as it is stated, "the intent and purpose of making and effecting the assurance for a provision for the said *John Martin*, in case he should have survived the said *Mary Martin*, hath determined and ceased;" that the wife

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of Mr. *Godsal* was her sister, and Mr. *Godsal* himself her cousin; and that, in consequence of the decease of *John Martin*, *Mary Martin* was unwilling to continue the assurance, and pay the annual sum to grow due from time to time as the premium for the same, and had proposed to *Godsal* to cause the policy to be assigned to him, which he had agreed to accept; it was witnessed that, for the considerations therein mentioned, *Fowke*, at the request of *Mary Martin*, assigned the policy to *Philip Godsal*.

Under this assignment, Mr. *Godsal* possessed the policy, and during his life he continued to pay the premium. He died in 1826, having made the Plaintiff (who is now his legal personal representative) his residuary legatee. The Plaintiff continued to pay the premium till the death of Mrs. *Martin*, which happened in 1805; and, after her death, he received the sum of 6570*l.*, as the sum due on the policy, conceiving it to be his own; but, a doubt being suggested whether there was not a trust of the policy for the next of kin of Mrs. *Martin*, he gave notice to them and her executors, and he has filed this bill to have the right declared.

For the Plaintiff it is alleged that, after the death of Mrs. *Martin*, the only object for which the assurance was made (namely, a provision for Mr. *Martin* for his life if he survived her) ceased; that payment of the premium, by which the assurance was kept up, was the result or consequence of a mere agreement between the husband and wife, which they might have abandoned during their joint lives, if they had thought fit; that, after the death of the husband, the wife was at liberty to keep up or abandon the policy at her pleasure; that, in fact, she was unwilling to keep it up; and having a right to discontinue payment of the premium, and thus abandon

abandon the policy, she had also a right to assign the policy to Mr. *Godsal*, and give him the opportunity, if he thought fit, to keep up the policy for his own benefit.

For the next of kin it was alleged, that the settlement contains an absolute declaration of trust for them, subject only to the power which Mrs. *Martin* had, but did not exercise, to dispose of the money due on the policy by will; that, after the death of Mr. *Martin*, the trustees were bound to apply a sufficient part of the income of the trust funds in paying the annual premium, and that the neglect to do so was a breach of trust; and on these grounds they claim the whole money paid on the policy, without allowing any thing for the premimus paid.

For the personal representative and residuary legatee it is alleged, that the will of Mrs. *Martin* may be so construed as to amount to an appointment of the money; or, if not, yet the money may be considered as part of her general personal estate passing by her will.

I am of opinion that the policy cannot be considered as appointed by the will of Mrs. *Martin*, or as forming part of her general estate. The question appears to me to be entirely between the Plaintiff and the next of kin of Mrs. *Martin*.

The only professed object of the settlement in the recitals, is to secure the property of Mrs. *Martin* for her sole use and separate benefit, and to make a certain provision for her during the continuance of the coverture; and it was for that object alone that she professed to assign the trust property to the trustees. But the provision as to the policy shews that, besides that object, she also intended to make a provision for her

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husband if he survived her; and, this being an object not stated in the recitals, we cannot in this case rely so much as in some cases may be safe upon the recitals, as affording the means of interpreting the whole instrument. The recital does, however, indicate that which must be deemed to be the principal intention, and it is not to be neglected. In every thing which does not relate to the policy, the provisions of the deed are in conformity with the object recited; and, taking the clause relating to the policy in connection with the rest of the deed, the question is, whether the clause did, or was intended to do, more than make a provision for the husband, if he should survive the wife. The next of kin contended that, besides making that contingent provision for the husband, she has intentionally or otherwise made for them a declaration of trust which could only be defeated by a testamentary appointment.

The case of *Anderson* v. *Dawson* (*a*), which was relied on by the next of kin, differs considerably from the present. In that case the fund was realised, and actually in the hands of the trustees. The trusts were distinctly declared, and, independently of any agreement to be performed or continued, the trustees were bound by their duty to carry those trusts into execution. In the present case the fund was not realised; it was to be realised and made available by acts to be done after the marriage, in pursuance of an agreement between the husband and wife, and to be continued during their joint lives, as the Plaintiff says, but, as the words of the deed are, and as the next of kin contend, during the life of the wife whether she died in the lifetime of her husband or not.

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(*a*) 15 *Ves.* 532.

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There is certainly a difficulty in saying that the words "during the life of the wife," shall be construed to mean "during the joint lives of the husband and wife;" but to do so would be to act in accordance with the nature of the contract, and the professed and apparent intention of the parties. And I think there is still greater difficulty in saying that, upon the construction of this settlement, the wife intended to create or has created a trust, not only against the husband, if he survived, but against herself if she survived; to continue the trust, principally made to secure a certain provision for herself during the continuance of the marriage, against herself and at her expence, after cessation of the coverture by the husband's death, for the purpose of realising a fund of which she was to have no enjoyment, but which became payable only on her death — which she was not to be able to dispose of otherwise than by will, and which, in default of appointment by will, might pass, upon her death, to her next of kin or to a subsequently taken husband.

The trustees held the policy, and were the legal owners of it. They had, by conveyance and assignment, the life estate, and by agreement between the husband and wife they were to pay the premiums upon the policy during the life of the wife; and, if the husband had survived the wife, or if the wife surviving had permitted the premiums to be paid, there would have been no doubt as to the persons entitled to the money payable on the policy. But the whole provision is founded on the agreement between the husband and wife: except by stating the agreement to be so, there is no declaration of trust, and there is not even a covenant on the part of the trustees. The case appears to be a case of mixed trust and agreement, and looking at the whole of the settlement, I think that the intention of the ultimate limitation in the clause

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in question, considered in connection with the rest of the deed, was only to shew that the agreement was to exclude the husband from taking more than a life interest in the investment of the policy money otherwise than by the gift of the wife, and that from the nature of the clause, considered as an agreement, it was open to the husband and wife during their joint lives, and to the wife if she survived, to alter that which was intended only for their mutual benefit; and it appears to me that, if Mr. *Fowke*, the surviving trustee, had availed himself of his power as trustee, and insisted on paying the premiums against the will of the widow, she might have compelled him to pay the whole income to her, and that this Court would not have considered her bound to perform the agreement for the benefit of mere volunteers.

Thinking that she had a right to refuse to keep up the policy or to permit the trustee to keep it up, I think that the trustee was entitled to assign it according to her direction, and consequently that the Plaintiff is entitled to the fund in question.

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Jan. 19, 20.

THIS was a supplemental bill filed by *Maria Collinson*, widow, *Anna Maria Collinson*, and *Caroline Palmer Collinson*, against *Harriet Pattrick*, *George Barham* and *Martha* his wife, *Robert Barham*, and other Defendants, and it prayed that the Plaintiffs might be entitled to the benefit of the original suit, and the proceedings therein, and that they might be at liberty to prosecute the decree made in that suit, and the accounts and inquiries thereby directed.

The original bill was filed by *William Catling*, and *Edward Pownall* and *Elizabeth* his wife, against *Harriet Pattrick*, *George Barham* and *Martha* his wife, *Robert Barham*, and other Defendants, and it prayed that the rights and interests of the Plaintiffs, under a bond dated the 18th of *November* 1801, and also their rights and interests under the will of *Thomas Etheridge*, in the real and personal estate of the testator, might be ascertained and declared, and that the will might be established and the trusts thereof carried into execution. The bond was given by the testator *Thomas Etheridge*, to secure the payment of 1000*l.* to *William Catling* within one month after his marriage (which took effect) with the testator's daughter *Elizabeth Etheridge*, and also a further portion, equal to such sum or sums as the testator in his life-time or by his will should give to each of his other

A bond, and all sums of money recoverable in respect thereof, were assigned to trustees, in trust for such intents and purposes, and such person or persons as *E. P.*, a married woman, should direct or appoint; and, in default of appointment, for her separate use. *E. P.* afterwards appointed her interest in the bond to certain persons, in order to indemnify them in case they should not be able to recover the whole of a sum appropriated by her husband, who was their solicitor, and for no other consideration appearing upon the deed.

Held, that this was an executed trust, to which, though without consideration, the Court would give effect; and that the appointees were entitled, as representing *E. P.*'s interest in the bond, to file a supplemental bill to have the benefit of the proceedings in a suit instituted for the purpose of having that interest ascertained and declared, and which had become defective by the bankruptcy of *E. P.*'s husband.

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other daughters. *Elizabeth Pownall* was the only surviving child of *William Catling* and *Elizabeth*, his wife, who died some time after the marriage; and by an agreement, dated in the month of *November* 1829, between *William Catling* of the one part, and *Edward Pownall* and *Elizabeth* his wife, of the other, it was agreed that *William Catling* should assign the bond of the 18th of *November* 1801, and the benefit thereof, and whatever might be recovered or received by virtue thereof, or by and from any devise or bequest in satisfaction thereof, to trustees for the separate use of *Elizabeth Pownall*. The testator *Thomas Etheridge* devised and bequeathed the residue of his real and personal estate to *Harriet Pattrick*, *George Barham* his son in law, and *Robert Barham* (whom he appointed his executors) in trust for his wife for life, and, after her decease, for the benefit of his grandchildren.

The usual decree for the accounts of the testator's estate was made on the 26th of *February* 1834.

The supplemental bill, after stating that divers proceedings had taken place under the decree in the original suit, proceeded to state that, by an indenture dated the 9th of *December* 1833, and made between *William Catling* of the first part, *Elizabeth Pownall* of the second part, *Edward Pownall* of the third part, and the Rev. *Richard Clough*, *Andrew Wood Baird*, and *William Pownall*, of the fourth part, after reciting the marriage of *Edward Pownall* and his wife, and the agreement of *November* 1829, and the death of *Thomas Etheridge*, it was witnessed that, in pursuance of such agreement, and for the considerations therein mentioned, *William Catling* assigned to the trustees the bond of the 18th of *November* 1801, and all sums of money which, on the death of *Thomas Etheridge*, became or were due and payable

payable or recoverable under or by virtue of the said bond, and under or by virtue of any devise or bequest of *Thomas Etheridge*, in satisfaction of the said bond, and all his (*William Catling*'s) right, title, and interest therein, upon trust, that the trustees and the survivor of them should stand possessed of and interested in the said bond thereby assigned, for such intents and purposes, and for such trusts as *Elizabeth Pownall*, at any time or times, notwithstanding her present or any future coverture, and whether covert or sole, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, under her hand and seal, or under her hand only, or by her last will and testament, should direct or appoint, and in default thereof upon trust for her sole and separate use.

The bill stated that the last-mentioned deed was executed by all the parties, except *Richard Clough* and *Andrew Wood Baird:* and it proceeded to state that, by an indenture, dated the 7th of *January* 1834, and made between *Elizabeth Pownall* of the first part, *Edward Pownall* of the second part, the Plaintiff *Maria Collinson* of the third part, and the Plaintiffs *Anna Maria Collinson* and *Caroline Palmer Collinson* of the fourth part, reciting, among other things, the bond of the 18th of *November* 1801, and the indenture of assignment dated the 9th of *December* 1833, and reciting that a partnership had then lately subsisted between *Edward Pownall* and *William Powell Hart* as attornies and solicitors at *Ipswich*, but that the same had been recently dissolved, and that, during the existence of such partnership, *Edward Pownall* borrowed and appropriated the sum of 1000*l.* belonging to the Plaintiff *Anna Maria Collinson*, and also the sum of 1500*l.* belonging to the Plaintiff *Caroline Palmer Collinson;* and falsely reciting an indenture of appointment, whereby *Elizabeth Pownall* was alleged to have appointed to trustees the trust monies assigned by the indenture of the

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the 9th of *December* 1833, upon trust to raise thereout the sum of 350*l.* and reciting that, in order to save harmless and indemnify the Plaintiffs *Anna Maria Collinson* and *Caroline Palmer Collinson*, in case they should not be able to recover the whole of the sums so borrowed and appropriated by *Edward Pownall*, it was witnessed that, in pursuance of and for effecting the said proposal, and in consideration of the premises, *Elizabeth Pownall*, in execution of the power given to her by the indenture of assignment, directed, limited, and appointed that all and every the sums of money to which she was entitled under the said assignment, and all her estate, right, title, &c. therein and thereto, should vest in the Plaintiff *Maria Collinson*, her executors, administrators, and assigns, as her and their own absolute properties, upon trust (subject to the alleged appointment for raising 350*l.*) to pay to the Plaintiffs *Anna Maria Collinson* and *Caroline Palmer Collinson* so much of the sums appropriated by *Edward Pownall* as they should not be able to recover, and to stand possessed of the residue upon the trusts of the indenture of the 9th of *December* 1833.

The bill proceeded to state facts for the purpose of shewing that no such prior charge as that recited in the indenture of the 7th of *January* 1834 had ever been made, but that such indenture was the first and only charge upon the trust-monies thereby assigned. It further stated that, on the 10th of *March* 1834, a fiat of bankruptcy issued against *Edward Pownall*, whereby the original suit had become abated or defective, and that the plaintiffs in that suit refused to make the same complete; and it charged that the whole of the rights and interests of the original Plaintiffs to and in the assets of *Thomas Etheridge* the testator, in respect of the bond or of any devise or bequest in satisfaction thereof, were now vested in the Plaintiffs to the supplemental suit, and they

submitted

submitted that they were entitled to have the benefit of the original suit and the proceedings therein, and to prosecute the same.

The defence made on the part of Mrs. *Pownall* was, first, that the original suit had not become abated or defective by the bankruptcy of *Edward Pownall*, who had no interest in his wife's separate estate; secondly, that the deed of the 7th of *January* 1834 was without consideration, having been executed by Mrs. *Pownall* upon a promise made by the *Collinsons* that they would continue to employ her husband as a solicitor, which promise had not been fulfilled; thirdly, that, if the deed was valid, the Plaintiffs were bound by the recital of the prior charge contained in it, and could only be incumbrancers to the amount of the difference between the trust-monies assigned and the recited prior charge. Some parol evidence was gone into, for the purpose of shewing that the *Collinsons* had promised that they would continue to employ *Edward Pownall*. It was admitted that no such prior charge, as that recited in the indenture of the 7th of *January* 1834, had been made; but it appeared to have been stipulated by Mrs. *Pownall*, that she would reserve 350*l.* for the payment of tradesmen's bills.

Mr. *Tinney* and Mr. *James Russell*, for the Plaintiffs, said that, if the suit had been instituted to recover the wife's separate estate only, it was improperly framed, and must be taken to be the suit of the husband alone, in which case his bankruptcy would render it defective. But Mrs. *Pownall*'s interest in the testator's residuary estate was not limited to her separate use, so that the husband had an interest in the subject of the suit, and his bankruptcy rendered a supplemental suit necessary. No steps having been taken by the Plaintiffs in the original

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original suit to supply the defect, the present Plaintiffs, in whom all Mrs. *Pownall*'s interest in the bond had in fact vested, were entitled to file a supplemental bill, and to have the conduct of the future proceedings in the cause. As to the alleged promise on the part of the Plaintiff *Maria Collinson* and her daughters to continue to employ *Edward Pownall*, no such promise appeared upon the deed, nor was there any written evidence of, or any allusion to such a promise in the correspondence which took place between the parties. Was it probable that the Plaintiffs would bind themselves to give to the man, who had appropriated their property, further and continued opportunities of abusing their confidence? What measure could be applied to such a promise as a consideration for executing this assignment? How long was *Pownall* to be employed, or under what conditions? or was he to be employed unconditionally, and whether he misconducted himself or not? Two months afterwards he became bankrupt; could the Plaintiffs then have continued to employ him? With respect to the false recital of a prior charge, it being admitted that no such charge existed, the first and only incumbrance could not be affected by the false recital, but the Plaintiffs would be entitled to the benefit of the whole security, as if no such recital had been introduced into the deed.

Mr. *Pemberton* and Mr. *Teed*, for Mrs. *Pownall*, insisted that the Plaintiffs were entitled to no relief. Evidence might be given of the actual consideration, though it did not appear on the face of the deed. At law nothng could be averred against the consideration appearing upon the deed; but it was otherwise in equity; and, if a party had been induced to execute a deed under assurances which had not been performed, it was open to him to prove the fraud which had been practised upon him. Mr. *Edward Pownall* had been employed as a solicitor

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solicitor by the Plaintiffs in this suit, and had appropriated to his own use a sum of 3500*l.* belonging to two of those ladies. The misapplication of this money having been discovered, he went over to *Brussels*, where his clients resided, and made a proposal to obtain for them a security upon his wife's separate estate for a part of the sum appropriated, provided they would continue to employ him as their solicitor, and thereby prevent the consequences which might result from the discovery of this transaction. They assented to the proposal, and *Pownall*, on his return to *Ipswich*, represented to his wife that he should be enabled to carry on his business, if she would consent to execute the assignment. She reluctantly consented, stipulating, however, for the reservation of 350*l.* to pay tradesmen's bills; and the recital of the prior charge in the indenture of assignment arises from an application having been made to certain persons to become trustees of the sum so reserved, which application was declined. The deed, executed under these circumstances by Mrs. *Pownall*, was taken over by *Pownall*'s clerk to *Brussels*, and evidence was given, by the clerk, of the Plaintiff, *Maria Collinson*, having, before the delivery of the deed to her, repeated the assurance, given by her and her daughters, that they would continue to employ Mr. *Pownall*. From the time the deed was delivered they ceased altogether to employ him, and two months afterwards he became bankrupt. If the engagement to employ *Pownall* was not the consideration which induced his wife to give up her separate property, what was the consideration? Here was no engagement not to sue the husband — no other consideration appearing upon the deed; and if the Plaintiffs, as they now contended, did not undertake to continue to employ *Pownall*, the deed was purely voluntary, and, if voluntary, the Court would not give any assistance to a party

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claiming under it: *Colman* v. *Sarrell* (*a*), *Pulvertoft* v. *Pulvertoft*. (*b*) It might be said that Mrs. *Pownall*, being *sui juris* as to her separate estate, was competent to make a gift of it to Mrs. *Collinson*, in trust for the benefit of Mrs. *Collinson*'s daughters. Assuming her to have contemplated this extravagant donation of her property, had she so completed the gift as to enable the party claiming under it to obtain the benefit of it in this Court? The deed, executed by Mrs. *Pownall*, passed no legal interest; for she was a married woman, and, at law, the deed of a married woman was inoperative. It purported to pass all the interest assigned by *Catling* to the trustees in the indenture of *December* 1833, and that interest was the money that might be recovered by the trustees in respect of the bond. The interest, therefore, was a mere *chose in action*, a sum of money, not actually in the hands of the trustees, but to be recovered by them in a suit; and it was clearly established by the authorities, that where any thing remained to be done to complete the legal interest in a person intended to be constituted a trustee for a volunteer, such volunteer had no *locus standi* in this Court. The late case of *Edwards* v. *Jones* (*c*), was an express authority to shew that the Court would not execute an imperfect attempt to make an assignment of a bond without consideration, even where the legal interest was in the person professing to assign it. There was no ground, however, for the supposition that this was a voluntary gift; the deed was obtained from Mr. *Pownall* under promises which were never intended to be fulfilled, and a court of equity would not give effect to an instrument so obtained.

As to the form of the suit, the Plaintiffs had only a partial interest, and, if that interest were recognised by the

(*a*) 1 *Ves.* jun. 50.
(*b*) 18 *Ves.* 84.
(*c*) 1 *Mylne & Craig*, 226.

the Court and satisfied, they would have no further interest in conducting the cause for the benefit of the numerous parties interested under the will. If they, as assignees of the interest of one of the Plaintiffs, might file a supplemental bill, every assignee of an interest, *pendente lite*, might claim a right to do so.

Mr. *Romilly*, for the assignees of *Edward Pownall*, who disclaimed.

Mr. *Richards*, for *William Pownall*, who, by his answer, stated that he had not executed the deed of the 9th of *December* 1833, nor accepted the trusts thereof.

Mr. *Turner*, Mr. *Geldart*, and Mr. *E. Montagu*, for other Defendants.

Mr. *Tinney*, in reply.

The principles upon which the Court acts, with respect to trusts executed, and trusts executory, are well established. If a trust is executed, it is irrevocable, and the Court will enforce it against the party creating it, whether there is or is not consideration for it. If a trust is executory, the Court will not give effect to it in favour of a volunteer. Whether a trust is executed or executory depends upon whether the party creating the trust has or has not done all in his power to make it absolute and conclusive against himself. The Plaintiffs do not call upon the Court to execute the trust; all they ask is a declaration that they are entitled to stand in the place of *Elizabeth Pownall*, who has done every thing to vest her interest in the bond in the Plaintiffs. If she disputes the title of the Plaintiffs, and seeks to set aside the deed under which they claim, she may file a cross-bill, but the deed cannot be set aside in this suit. The cases cited have no application to the present case. *Colman* v.

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Sarrell was a case in which the subject of voluntary assignment was stock which the assignor never transferred. He did not do all in his power, therefore, to put the subject of assignment out of his control, and this Court could not compel a transfer of stock. The distinction between a voluntary assignment of stock, and a voluntary assignment of a bond is noticed by the Master of the Rolls in *Fortescue* v. *Barnett* (*a*), where his Honor considered the interests of the equitable assignee as a debt entitling him to come in this Court as a creditor, subject of course to the claims of creditors for value, against the assets of the assignor. In the late case of *Godsal* v. *Webb* (*b*), the subject of a voluntary assignment was a policy of assurance; and in *Fortescue* v. *Barnett*, where a person assigned a policy of assurance, effected on his own life, to trustees for the benefit of his sister and her children, the trust was held to be executed, and binding against the party creating it. If the trust is executed, it is immaterial whether the interest of the party creating it is legal or equitable. *Sloane* v. *Cadogan*. (*c*) *Edwards* v. *Jones* was a case in which a mere memorandum was indorsed upon the bond in question, and there was evidently no complete act which amounted to an assignment. If the act had been complete, the Lord Chancellor distinctly intimated that he acquiesced in the principle on which *Fortescue* v. *Barnett* was decided, and that the Court would have given effect to it.

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Considering this as a contract of indemnity entered into by a married woman having separate estate, and in that character capable in this Court of entering into such a contract, is there a consideration which this Court would consider sufficient to support such a contract?

Mr.

(*a*) 3 *Mylne & Keen*, 36.
(*b*) *suprà*, p. 90.
(*c*) *Sugd. V. & P.* vol. ii. p. 588. 6th ed.

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Mr. *Tinney.*

For the purposes of this suit Mrs. *Pownall* is bound by the consideration which appears upon the deed; and, even in a suit instituted for the purpose of setting aside the deed, every thing must be taken most strongly against the grantor, and, except in a case of fraud, no additional consideration can be imported into a deed except for the purpose of supporting it. Consideration *dehors* a deed may be averred to support, but not to defeat its contents. With respect to the 350*l.*, though in fact there was no charge to that amount as recited in the deed, yet as Mrs. *Pownall* appears to have stipulated for a reservation of her interest to that amount, the Plaintiffs will not insist upon more than the sum assigned, *minus* the 350*l.* so reserved.

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In this case the Plaintiffs have been defrauded of a considerable sum of money, the whole of which they will probably lose, if they do not obtain the benefit of their security. On the other hand Mrs. *Pownall* appears to have executed the deed, under which the Plaintiffs claim, with a view of obtaining a benefit for her husband, which in fact was never obtained; and, if the Plaintiffs succeed in their claim, she will have given up her separate property, without any equivalent, to a stranger. On either side it will be a case of considerable hardship for the party against whom the Court must decide. (His Lordship proceeded to state the facts of the case.)

Three objections have been raised to the relief prayed by this bill. First, it is said that the deed of the 7th of *January* 1834 was executed by Mrs. *Pownall* for a consideration not stated upon the deed, and under an engagement which has never in fact been performed. Next, it is said that the deed was executed without any

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consideration; and that, the deed being voluntary, and something requiring to be done by the party creating the trust, it is a trust which cannot be executed by this Court. Thirdly, it is insisted that the suit is not framed in conformity with the ordinary rules of the Court.

As to the first point, it does not appear to me that I can adjudicate upon it, in the present state of this record, and in the absence of a cross-bill impeaching the validity of the deed.

With respect to the second objection, it seems to me that, so far as depended upon the party executing this deed, every thing has been done to constitute an executed trust. It is certainly a matter well worthy of consideration how far the peculiar situation of a married woman, entering into such an engagement as the present by which she binds her separate estate, is not entitled in a court of equity to the same species of protection which the law gives to persons entering into a legal obligation, and whether a contract of indemnity, so entered into, should not in this Court be supported by a valuable consideration. A declaration of trust is considered in a court of equity as equivalent to a transfer of the legal interest in a court of law; and, if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration. If this had been a transaction resting on an agreement, not conferring the legal interest — if it had been an executory contract, this Court, in the absence of consideration, would not have given effect to it; but if what has been done is equivalent to a transfer of the legal interest, the parties, in whose favour the trust is created, are entitled to have the benefit of it in this Court, and I am of opinion that this deed gives an interest to the Plaintiffs which does so entitle them.

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The only remaining question is whether the Plaintiffs have brought forward their claim in the proper form, and I am of opinion, that the interest in the bond, which at the institution of the original suit belonged to Mr. *Catling*, having been assigned by him in trust for Mrs. *Pownall*, and Mrs. *Pownall* having, by virtue of her power of appointment, transferred her interest to the Plaintiffs, it is quite in conformity with the ordinary rules of the Court, that the Plaintiffs should file this bill to have the benefit of the proceedings in the original suit. It was necessary that some one should supply the defect in the suit, occasioned by the bankruptcy of *Pownall*, for the purpose of enabling all the persons interested under the will of the testator to have their rights established, and I am of opinion that the Plaintiffs, having properly filed the supplemental bill, are entitled to have the conduct of the suit.

Bill dismissed against *William Pownall* and the assignees of *Edward Pownall*, with costs to be paid by the Plaintiffs without prejudice to the question whether the Plaintiffs were entitled to be reimbursed. The Plaintiffs declared entitled to the benefit of the indenture of the 7th of *January* 1834, subject to the payment of 350*l.* for the separate use of Mrs. *Pownall*, and also entitled to the benefit of the original suit and the proceedings under the decree. Further directions and costs reserved.

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July 22. 24.

LUCAS *v.* BOND.

A. being entitled to a contingent interest in 1000*l.*, being a moiety of 2000*l.*, part of a sum of 20,000*l.* directed by the will to be invested, and which was accordingly invested in the 3 per cent. consols, advertised it for sale by auction, describing it as a reversion to 1000*l.* principal money payable on a contingency, and part of a sum of 20,000*l.* invested in the 3 per cent. consols. The interest having been put up for sale in pursuance of the advertisement, *B.* became the purchaser; and by an indenture reciting the bequest, the investment of the legacy, and the purchase at the sale, *A.* assigned to *B.* "all that sum of 1000*l. sterling*, being one moiety of the legacy or sum of 2000*l.* bequeathed by the will."

Held, that *B.* was entitled to the value of the 1000*l.* in its state of investment.

LUKE FOREMAN, by his will dated the 20th of *June* 1798, devised and bequeathed to his wife *Mary Foreman*, *James Seton*, and *Jonathan Boucher*, and to the survivors and survivor, and the heirs of the survivor, all his freehold, copyhold, and leasehold estates, and all his personal estate upon trust to raise by sale or mortgage the sum of 12,000*l.* within twelve months from his decease, and invest the same at interest on such real or government securities, as any two of them should think fit, and permit *Mary Foreman* to receive the interest and dividends for her life for her separate use, and, after her decease, upon trust, that the surviving trustees or trustee should pay 2000*l.*, part of the 20,000*l*, to *Judith Ann Limerick;* but, should she not be living at his wife's decease, then he directed the said sum of 2000*l.* to be divided into four parts, three parts of which were to be paid as therein mentioned, and the sum of 500*l.*, being the remaining fourth part of the said sum of 2000*l.*, he directed his trustees to pay to *Jasper Swete;* but, should he not be living, then the testator directed the said sum of 500*l.* to be paid and divided to and among as many of the children of *Jasper Lucas* as might be then living in equal proportions. And he further bequeathed 2000*l.*, other part of the said principal sum of 20,000*l.*, unto and among such of the children of *Jasper Lucas* as should be living at the decease of his wife *Mary Foreman*, share and share alike; and he gave the rest and residue of his real and personal estate to his wife *Mary Foreman*, for her

her separate use, and appointed *Mary Foreman* and the other trustees executors of his will. The testator afterwards made a codicil to his will, by which he appointed *John Chandler* his executor and trustee in place of *Jonathan Boucher*.

The testator died in *November* 1814, and the executors and trustees appointed by his will and codicil proved the same, and they raised the sum of 20,000*l*., and invested the same in the purchase of 33,898*l*. 6*s*. 1*d*. 3 per cent. consolidated Bank annuities.

Judith Ann Limerick and *Jasper Swete*, two of the legatees named in the will, died in the life-time of *Mary Foreman*: *Jasper Lucas* also died in the life-time of *Mary Foreman*, leaving the Plaintiff *Gillman Lucas*, *Jasper William Lucas*, *Eliza Lucas*, and *Catherine Emily Lucas*, his four only children, surviving him.

Eliza Lucas, and *Catherine Emily Lucas*, died in the life-time of *Mary Foreman*, leaving the Plaintiff and *Jasper Gillman Lucas* entitled in equal shares to a contingent interest in the legacies of 500*l*. and 2000*l*.

In the month of *March* 1828, the Plaintiff, being desirous of selling his contingent interest in one moiety of the legacy of 2000*l*., published the following advertisement.

"Reversion to 1000*l*. principal money. The particulars and conditions of sale of the reversion to the principal sum of 1000*l*., being a legacy under a will, and receiveable upon the death of a lady aged sixty-eight years, which will be sold by auction by Messrs. *Farebrother*, *Wilson*, and *Lye*, at *Garraway*'s Coffee House, on *Wednesday* the 26th of *March* 1828, at 12 o'clock.

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o'clock. Particulars — the reversion to 1000*l.* principal money, being a legacy under a will, and payable to the vendor, who will be of the age of fifty-three in *August* next, and whose life is insurable, provided he survives a lady sixty-eight years. The above legacy is part of the sum of 20,000*l.*, principal money invested in the 3 per cent. consols, in the names of most respectable gentlemen, the executors under the will: the reversion will be subject to legacy duty at the rate of 10 per cent."

One of the conditions of sale was as follows: — "If, through any mistake, the property comprised in this particular should be erroneously described, such error or errors shall not vitiate or annul the sale thereof; but the vendor or purchaser, as the case may happen, shall pay or allow a proportioned value according to the average of the whole purchase-money as a compensation either way, to be ascertained by two indifferent persons or their umpires."

The Plaintiff's contingent interest under the will in the sum of 1000*l.*, was put up to sale by auction in pursuance of this advertisement, and the Defendant, *Benjamin Bond*, was declared the purchaser at the price of 310*l.*

An indenture of assignment, dated the 16th of *April* 1828, between the Plaintiff of the one part, and the Defendant *Bond* of the other part, was afterwards executed by the parties thereto. By that indenture, after reciting the will and codicil of *Luke Foreman*, and his death, and reciting that the said legacy of 20,000*l.* had, pursuant to the directions of the will, been invested in the purchase of 3 per cent. consolidated Bank annuities, which were then standing in the names of *James Seton* and *John Chandler*, and that *Jasper Gillman Lucas*, and the

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the Plaintiff, were then presumptively entitled in the event of their surviving *Mary Foreman* to the legacy of 2000*l.* in equal shares, and that the Plaintiff had caused the sum of 1000*l.*, being the full share and proportion of the said legacy or sum of 2000*l.*, to which he was so presumptively entitled, to be put up to sale by auction, at which sale the Defendant *Bond* had become the purchaser, it was witnessed that, in consideration of the sum of 370*l.* paid to the Plaintiff by *Bond*, the receipt whereof, and being for the absolute purchase of the said sum of 1000*l.*, part of the legacy of 2000*l*, the Plaintiff thereby acknowledged, he, the Plaintiff, assigned all that the said sum of 1000*l.* sterling, being one moiety of the said legacy or sum of 2000*l.* by the recited will given and bequeathed as therein mentioned, and all the right, title, interest, possession, claim, and demand whatsoever of him the Plaintiff, in the said sum of 1000*l.* thereby assigned, part of the said legacy or sum of 2000*l.* and interest, and every part thereof, to hold, receive, take, and enjoy the said sum of 1000*l.* thereby assigned, part of the said legacy or sum of 2000*l.*, and every part thereof, to and by the Defendant *Bond*, his executors, &c., for his and their own use and benefit absolutely. And the Plaintiff thereby constituted *Bond*, his executors, &c., the lawful attorney and attornies of him the Plaintiff, to sue for, recover, and demand from the trustees, &c., all that the sum of 1000*l.* thereby assigned, part of the said legacy or sum of 2000*l.*, and all interest thereof. And the deed contained covenants for good title, the Plaintiff's appearance at any insurance office to enable the Defendant to effect a policy on his life, and for further assurance.

The Defendant *Bond* afterwards purchased the Plaintiff's contingent interest in the legacy of 250*l.*; and an indenture, dated the 30th of *October* 1829, was executed, by

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by which, after similar recitals, it was witnessed that, in consideration of 120*l.* paid to the Plaintiff by *Bond*, the Plaintiff assigned all that sum of 250*l.* sterling, being one moiety of the said legacy or sum of 500*l.* by the will given and bequeathed, together with all interest to accrue for the same, and all the right, title, &c. And the deed contained a power of attorney and covenants similar to those in the former indenture.

Mary Foreman died on the 17th of *May* 1834, and the trustees thereupon, in pursuance of the trusts of the will, sold the sum of 33,898*l.* 6*s.* 1*d.* 3 per cent. consols, which had been purchased with the sum of 20,000*l.* From the increase in the value of the stock, which had taken place during the period of investment, the sum produced by the sale of the 33,898*l.* 6*s.* 1*d.* 3 per cent. consols greatly exceeded the sum of 20,000*l.*; and the share of that increase, in respect of the Plaintiff's interest in the legacies of 2000*l.* and 500*l.*, amounted to 775*l.* 8*s.*

On the 17th of *September* 1834, the Plaintiff caused a notice to be served upon the trustees not to pay over the surplus, or any part thereof arising from the increase in the value of the 20,000*l.* bequeathed by the will, to *Bond*, or any person on his behalf.

The bill was filed by the Plaintiff against the Defendant *Bond* and the trustees; and it prayed that, after paying to the Defendant the sum of 1000*l.* and 250*l.* out of the sum of 2025*l.* 8*s.* then in the hands of the trustees, the Plaintiff might be declared entitled to the remaining sum of 775*l.* 8*s.*

The bill charged, that some time after the stock, in which the legacy of 20,000*l.* was invested, had been sold, the Defendant *Bond* applied to the trustees for the

the sums of 1000*l.* and 250*l.* to which he claimed to be entitled under the indentures of the 10th of *April* 1828 and the 30th of *October* 1829 respectively, and that, on being informed by the trustees, that the produce of the sale of the stock considerably exceeded the sum of 20,000*l.* directed by the will to be invested, and that there would be a proportionate surplus as to the sums of 1000*l.* and 250*l.*, the Defendant *Bond* then, for the first time, claimed to be entitled to the benefit of such surplus.

The Defendant *Bond*, by his answer, said that he intended to purchase whatever the Plaintiff was entitled to in respect of the legacies of 2000*l.* and 500*l.* bequeathed by the will; and he admitted that he first demanded payment of the sums of 1000*l.* and 250*l.*, being then ignorant that there was any surplus; but that, as soon as he was informed by the trustees of such surplus, he claimed the same, and he submitted that he was well entitled thereto.

The Plaintiff went into some evidence: a letter written by him, before the second purchase, contained the following passage: —"As Captain *Bond* purchased my one-half of the other property under the will, I should prefer his having the half of this 500*l.* to which I shall become entitled."

The question in the cause was, whether the Defendant *Bond* was entitled to the sums of 1000*l.* and 250*l.* sterling, or to the value of those sums in their state of investment.

Mr. *Tinney*, Mr. *Griffith Richards*, and Mr. *Malins*, for the Plaintiff, insisted that the conduct of the Defendant clearly shewed what he contracted for, and what

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what he considered that he had purchased; for it did not enter his mind to ask for more than the sums sold to to him, till the trustees told him that the stock in which the sums bequeathed by the will had been invested, had, upon the sale of it, produced considerably more than the money. The subsequent demand was an afterthought founded upon that information. The letter written by the Plaintiff to the Defendant's solicitor, before the second purchase, shewed also what was his understanding of the nature of both contracts, and that it was the sum of 250*l.*, and not the stock in which that sum had been invested, which he desired to sell to the Defendant, in like manner as he had sold the former sum of 1000*l.* If there were any doubt from the circumstances of the transaction as to the subject of the contract, that would be removed by the introduction of the word *sterling* in the deeds. It was impossible that 1000*l.* and 250*l. sterling* could mean the stock in which those sums had been invested. It was admitted, indeed, by the Defendant *Bond*, that he, in the first instance, demanded only the sums of 1000*l.* and 250*l.*; but then he insisted that he purchased the Plaintiff's rights under the will, and that, when he first made his demand, and until he was informed of the Plaintiff's rights by the trustees, he was not aware to which of the surplus the Plaintiff was entitled. There was no foundation for that claim for the Plaintiff's rights under the will were contingent; and, if his brother had died before the legacy became vested, his interest would have been doubled. Would the Defendant in that case have had any equity to claim legacies of 2000*l.* and 500*l.*? On the other hand, if the sale of the stock had produced sums less than 1000*l.* and 250*l.*, might not the Defendant, under the covenants contained in the indentures, have enforced the payment of the difference, and would the Plaintiff have had any equity to resist such payment? If the Defendant could have recovered any deficiency

deficiency, upon what principle of equity could he claim to be entitled to the increase? It was clear that the Defendant considered himself as having purchased what the Plaintiff intended to sell; and the intention of both purchaser and vendor being the same, and having been expressed in the most unequivocal language upon the deeds, the Plaintiff was entitled to the decree sought by this bill.

Mr. *Pemberton* and Mr. *Turner*, *contrà*, admitted that the Defendant *Bond* had, on his first application to the trustees for payment, mistaken the extent of his rights; but his rights could not be varied by that mistake. As soon as he was informed of the increase in the amount of the legacy which had accrued from its investment, he claimed, as he was justly entitled to claim, the benefit of that increase. The subject of sale, as stated in the particulars, was "the reversion of 1000*l.* principal money, part of 20,000*l.* principal money, invested in the 3 per cent. consols." The first deed of assignment recited at length the bequest of the legacy of 2000*l.*; that such sum had been invested in the 3 per cent. consols, and was then standing in the names of the trustees; that the Plaintiff and his brother would, on surviving *Mary Foreman*, become entitled to the same in equal shares, and that the Plaintiff had caused his share or proportion of such legacy of 2000*l.* to be put up for sale, and that the Defendant had become the purchaser; and the deed then assigned the said sum of 1000*l.* sterling, being one moiety of the sum of 2000*l.* to which the Plaintiff would become entitled on his surviving *Mary Foreman*, and all the Plaintiff's right or interest in the said sum of 1000*l.*, part of the said legacy of 2000*l.* There could be no doubt, even in the absence of all authority, that this assignment would have carried whatever increase of value had accrued

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accrued from the investment of the 1000*l.*, and that the word "sterling" could not possibly have the effect of superinducing a construction at variance with all the recitals. That word was sufficiently reconcilable with the other parts of the instrument, for the 1000*l.* was so much sterling money until investment; and as the deed recited the investment, and the 1000*l.* was described as a moiety of the legacy, the subject of the assignment was intelligibly, though not very accurately, defined. But authority was not wanting to shew that the assignment of the legacy would pass all the subsequent accretions which it had received in its state of investment. The case of *Courtney* v. *Ferrers* (*a*) was precisely in point. There a policy of assurance, described as a policy for the sum of 3000*l.* on the life of *A.*, was assigned by a settlement to trustees, with a power given to *B.* to dispose of it by will. *B.*, after reciting the settlement, bequeathed 1000*l.*, part of the sum of 3000*l.*, to *A.*, and the remaining sum of 2000*l.* to *C.* At *A.*'s death the sum due on the policy had increased by bonuses to the sum of 9000*l.*; and it was held that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to *A.* and *C.* in proportion to their legacies. The argument, founded on the contingent nature of the Plaintiff's interest, and on the absurdity of supposing that, if the Plaintiff had survived his brother, the Defendant could have claimed the Plaintiff's increased interest under the will, had no application, because the 1000*l.* assigned was expressly described as a moiety of the 2000*l.* Neither was there any reason for supposing, considering the several recitals and the whole frame of the instrument, that, if the investment had produced a sum less than the 1000*l.*, the Defendant could have successfully maintained an action of

(*a*) 1 *Sim.* 137.

of covenant for the difference. The observations which were applicable to the first assignment, applied equally to the second.

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Mr. *Seton*, for the trustees.

Mr. *Tinney*, in reply.

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The deed which the Plaintiff and Defendant executed does not seem to me to have been properly framed to meet the views of either of the parties. If, as it is contended by the Defendant, it was the intention of the deed to assign the stock in which the sum of 1000*l.* had been invested, the deed is not properly framed to give effect to that intention, for it contains no expression directly applicable to that state of circumstances, nor is there any assignment of the funds in which the legacy was invested. If, on the other hand, the intention of the parties was such as the Plaintiff contends, it is most extraordinary that no provision should be made by the deed as to the surplus value of the stock after payment of the 1000*l.*

The Plaintiff was entitled, together with his brother, to a contingent interest in a legacy of 2000*l.*, forming part of a sum of 20,000*l.*, which, according to the directions of the will, was to be invested in 3 per cent. consolidated annuities within three months after the testator's decease. What the Plaintiff was entitled to, was not literally a contingent legacy of the sum of 1000*l.*, but a share of the stock in which the whole 20,000*l.* had, in pursuance of the will, been invested, corresponding to the value of this sum of 1000*l.* Being so entitled, and being desirous of selling his contingent reversionary

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interest, he published these particulars of sale. (His Lordship read the particulars of sale.)

According to these particulars of sale, he offered to sell his interest in 1000*l.* principal money invested in 3 per cent. consols: the right, therefore, which he represented himself to be entitled to, was not to sterling money, but to the investment.

The Defendant having become the purchaser of this interest at the sale, the Plaintiff executed an indenture which recites, &c. (His Lordship read the recitals.)

Hitherto there appears to be no ambiguity, but when we come to the assignment, instead of assigning, as might be expected from the recitals, all that legacy of 1000*l.* so invested in stock, he assigns all that sum of 1000*l.* sterling, being one moiety of the said legacy or sum of 2000*l.* bequeathed by the will. Now, notwithstanding this word *sterling*, which is the only word creating any ambiguity, considering that it is explained by the following words, which describe the 1000*l.* sterling as a moiety of the legacy bequeathed by the will, the impression upon my mind is, that the parties did mean the 1000*l.* in its state of investment; and, if that was meant, the word *sterling* is not of such importance as to outweigh the other circumstances by which the effect of the instrument is to be determined. I am of opinion, therefore, that the Plaintiff is not entitled to the relief which he asks, and that the bill must be dismissed; but there is so much ambiguity in the case, that I think it must be dismissed without costs.

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March 9.
July 6.
Aug. 5.

THE bill was filed to establish a will, and to have the personal estate, and the produce of the real estate of the testator, applied according to the trusts thereof. *Robert Ball*, who was the heir at law of the testator, was made a party Defendant; and being in contempt, he obtained an order of the Court, under the 1 *W.* 4. *c.* 36., to defend *in formâ pauperis*, without paying the costs which he had incurred. By his answer, *Ball* disputed the validity of the will, insisting that it was attested by only two witnesses. At the hearing, the will was established against him; and, on dismissing the bill against him, a question was raised whether he was entitled to *dives* costs, or to such costs only as he had actually incurred.

The general rule is, that a party who sues or defends *in formâ pauperis* shall have only such costs as he has paid or become liable to pay; but the Court has a discretion in each case.

An heir at law, defending *in formâ pauperis*, in a suit to establish a will, was held, under the circumstances, to be entitled only to pauper costs.

Mr. *Hall*, for the Defendant *Ball*, cited *Wallop* v. *Warburton* (*a*), as an authority to shew that, where a party defending *in formâ pauperis* was entitled to receive costs, his costs were to be taxed in the usual manner as *dives* costs. This was a proceeding *in invitum;* and where an heir at law was brought into Court, for the advantage of the Plaintiff, to have the will established against him, the Court always treated him with indulgence. If he cross-examined the Plaintiff's witnesses, he was entitled, as of course, to his costs, whether the will were established or not; *White* v. *Wilson* (*b*). The Court had a discretion as to the costs to be allowed to persons suing or defending *in formâ pauperis; Rattray* v. *George* (*c*); and in the case of an heir

(*a*) 2 *Cox*, 409.
(*b*) 13 *Ves.* 87.
(*c*) 16 *Ves.* 232.

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heir at law, that discretion ought to be exercised in favour of the pauper.

Mr. *Temple*, *contrà*, said it would be a strange anomaly if a pauper, who never paid costs, were entitled to receive *dives* costs. At any rate, if it were held that he was so entitled, the costs which he had incurred, before he obtained the order to defend *in formâ pauperis*, ought to be deducted from the costs which he was to receive.

The matter stood over upon an understanding that, if the costs which he had incurred before the order to defend *in formâ pauperis* was made, exceeded the costs he was to receive, when taxed in the ordinary way, the bill should be dismissed against him without costs.

July 6. On a subsequent day, the question was again raised, and his Lordship said he would look into the cases, before he decided the point.

Aug. 5. *The* MASTER *of the* ROLLS.

The question was, whether an heir at law who had defended *in formâ pauperis*, and was entitled to costs, should have the same costs as if he had not defended *in formâ pauperis*, or only such costs as should reimburse him for expenses actually incurred.

The general rule is, that a party, who sues or defends *in formâ pauperis*, shall have only such costs as he has paid or become liable to pay.

Cases have occurred in which the Court has given larger costs, and the authorities cannot easily be reconciled. Lord *Eldon* stated the result of them to be, that the

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the Court had a discretion in each case. And the question is, whether there are any circumstances to take this case out of the ordinary rule, so as to entitle the Defendant to costs beyond those which the ordinary rule gives him. It does not appear to me that there are any such circumstances, and therefore the Defendant must have such costs only as have been called pauper costs.

See, in addition to the cases cited, *Scatchmer* v. *Foulkard*, 1 *Eq. Ca. Abr.* 125. *Angell* v. *Smith*, *Prec. in Cha.* 219. *Denn* v. *Russel*, 1 *Dick.* 427. *Blanchard* v. *Killick*. Exch. cited 16 *Ves.* 233. *Frost* v. *Preston*, 16 *Ves.* 160. *Beames on Costs*, 121.

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April 10, 11. 18. *May* 31.

The ATTORNEY-GENERAL *v.* CAIUS College.

A testator, contemplating that a fixed annual income of 250*l.* would arise from the investment of 5000*l.*, which annual income he directed to be distributed by his supervisors in the manner directed by his will, gave to his executors and other persons certain property, and directed them, after his death, to erect a grammar-school for the instruction of five score scholars; and he ordered six tenements to be built for six almsfolk, and ordained six fellowships and scholarships to be founded in *Caius* College. He then appointed the master and fellows of *Caius* College to be the supervisors of his will, and willed that the master and four senior fellows should perform all that was appointed to be done by the supervisors, and he gave to the master and four senior fellows for their pains, yearly, the sums of money afterwards appointed to them. He then gave particular sums, amounting in the whole to 243*l.* 14*s.* 8*d.* (among which were a sum of 3*l.* to the master, and 30*s.* each to the four senior fellows), and he willed that the remainder of the 250*l.* per annum should be from time to time bestowed in such charitable uses as his executors for their times, and, after, his supervisors, should think fit.

The sum of 5000*l.*, given by the will, was invested in land, and the rents had increased greatly beyond the 250*l.* originally contemplated by the testator.

Held, that the master and four senior fellows took the remainder of the 250*l.* upon trust for charitable purposes, exclusive of any application of it to their own benefit; and that they were entitled to a proportion of the surplus rents in respect of the gift of the remainder, *pro ratâ*, with the other specified objects of the testator's bounty.

Principles upon which the Court proceeds in the exercise of its jurisdiction over charitable foundations, and in the application of relief, where the funds have for a long period been, without corrupt intention, misapplied by the trustees:

The Court considers not only the terms of the gift, but the circumstances under which the gift was accepted, and the foundation established.

A college is under no obligation to accept an accession to its foundation, or any other trust; but, if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust.

If there are questions upon the original instrument of foundation, and an arrangement be made at the time of acceptance, and is evidenced either by contemporaneous instruments, or even by constant subsequent usage, which may be considered as evidence of such arrangement, the Court will not disturb it, though in its own view of the original instrument, that arrangement was in effect not expedient.

Where the founders of charitable institutions have thought fit to appoint colleges to be trustees of their foundations, the Court is not at liberty to interfere with the will of the founder in that respect, upon the notion that, when individuals are trustees, there is a greater personal responsibility.

Where there had been great errors and misapplications of the charitable funds committed by the trustees and their predecessors for two centuries, but no corrupt or improper motive was imputed to them, the Court refused to appoint new

THIS information was filed by the Attorney-General, at the relation of *William Reeves* and others, against the master and fellows of *Gonville* and *Caius* College

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lege in the University of *Cambridge*, and against the master and other members of the College in their individual capacities, and against Mr. *Bailey*, the schoolmaster of a free grammar-school, founded by Dr. *Stephen Perse*, the testator in the cause. The information prayed an account of the property belonging to, or applicable to the purposes of the charity founded by Dr. *Perse*, which had been possessed by the master and fellows of the College; and a declaration that the income thereof was applicable to the charitable purposes declared in the will of Dr. *Perse*, and of *George Griffith*, and particularly in support of the free grammar-school, and the maintenance of the master and usher thereof; and that the rents of certain hereditaments in *Free School Lane* in *Cambridge*, were exclusively applicable to the support of the school, and of the master and usher. The information also prayed, that the master and fellows in their corporate capacity, and the other Defendants personally might answer for such part of the income as had been improperly applied; and that the master and fellows of the College, and the master and four senior fellows thereof might be removed from the office of trustees and supervisors of the will, at least so far as respected the school and the management thereof, and the appointment of the master and usher thereof, and that ordinances and orders might be made for the government of the school for the time to come.

This charity was founded by the will of Dr. *Stephen Perse*, dated the 27th of *September* 1615. The testator gave certain sums of money, amounting to 5000*l.*, to be advanced by way of loan to certain corporations; and, contemplating that a fixed annual income of 250*l.* would arise therefrom, he directed the same to be distributed by his supervisors in the manner directed by his will. He then gave to his executors, and other persons cer-

new trustees. And in consideration of the great accumulation of the charity property, the result of the care and economy of the trustees, and of other circumstances, the Court, notwithstanding the errors which had been committed, allowed to the trustees their costs of the suit out of the funds which had been so accumulated.

The Court directed, that in settling a scheme for the grammar-school, liberty should be given to the master to approve of a plan for adding instruction in writing and arithmetic to instruction in grammar, and other learning fit to be taught in a grammar-school.

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tain property in *Cambridge*, and directed them, after his death, to erect and build a convenient house to be used for a grammar-school, with a lodging chamber for the master and another for the usher; and he willed that five score scholars born in *Cambridge*, *Barnwell*, *Chesterton*, and *Trumpington*, and no more nor any other, should be in the free school taught and instructed, and those freely. He then ordered to be built six tenements for the habitation of six poor almsfolk, and ordained six fellowships and six scholarships to be founded and settled in *Gonville* and *Caius* College, to be called Dr. *Perse*'s fellows and scholars. He appointed the master and fellows of the foundation of the college to be supervisors of his will, and willed that the master and four senior fellows should execute and perform all that was appointed to be done by the supervisors; and he gave to the master and four senior fellows for their pains, yearly, the sums of money afterwards appointed to them. The will then proceeded to direct the application of the 250*l.* per annum, as follows: —

"Item, I will that the said 250*l.* per annum to be received as aforesaid, yearly by my supervisors, to be by them yearly paid out in such sort to such persons and purposes as by this my will is appointed to be paid in perpetuity, at the two feasts of *St. Michael* and the *Annunciation* yearly, by equal portions. Item, to the schoolmaster of my free school 40*l.* per annum, and to the usher 20*l.* per annum for ever. (He then proceeded to give other particular sums, amounting in the whole to 243*l.* 14*s.* 8*d.*, among which were the following: —) Item, to the master, fellows, and scholars of the said College, towards the reparations of the buildings of the said College, now built and hereafter to be built, and increase of their stock, 6*l.* 13*s.* 4*d.* Item, to the master

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master of *Gonville* and *Caius* College for the time being, 3*l.* yearly for ever; and to the four senior fellows of the ancient foundation of the said College from time to time 30*s.* a piece yearly, for ever. [The testator then disposed of the remainder of the 250*l.* as follows:] The remainder of the said 250*l.* per annum, I will, shall be from time to time bestowed in such charitable uses as my executors for their times, and, after, my supervisors shall think fit."

He appointed *Valentine Carey*, *Martin Perse*, and *Robert Spicer* to be executors, and contemplating the possibility of the intended loans not being effected, he, in that case, empowered his executors to invest the 5000*l.* in the purchase of land to produce an income of 250*l.* a year, *ultra* reprises, to be purchased or taken in mortmain, or to such uses and to such feoffees, or in such manner as by his executors or the survivor of them, and, after their time, by his supervisors should be thought fit, so always as the yearly revenue thereof might be, yearly from time time received, laid out, and paid in such manner, to such uses, intents, and purposes, and to such persons as before in his will was appointed to be paid in perpetuity; and at the end of his will he ordained that, after the death of his executors, the master and fellows of the College should be executors of his will, and should perform whatever his former executors should leave unperformed; provided, however, that the master and four senior fellows should, after the death of the first named executors, have the ordering, disposing, election and appointment of all things appointed to his executors or supervisors by his will.

The corporations, to whom the testator desired that the 5000*l.* should be advanced by way of loan, declined to accept the same; and that sum was, in pursuance of the

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the directions of the testator in case the loans should not be accepted, invested in the purchase of land, and the land so purchased was conveyed to the master and fellows upon the trusts of the will. The income arising from this property had increased from the sum of 250*l.* originally contemplated by the testator, to upwards of 2000*l.* a year.

It was admitted at the bar, on the part of the Defendants, that great errors and irregularities had been committed in the management of the property, in the distribution of the income, and particularly in the conduct and management of the school; and a reference for a scheme was not, therefore, resisted.

The principal questions raised upon the information were—first, whether the master and four senior fellows took, under the bequest of the remainder of the 250*l.*, the whole surplus income after payment of the specific bequests, as trustees for such charitable purposes as they thought fit, and for the benefit of the College, if they so thought fit to exercise their discretion; or whether they took only, under the gift of the remainder of the 250*l.*, a rateable proportion of the surplus income with the other objects of the specific bequests, as trustees for charitable purposes, exclusive of an application of it to their own benefit. Secondly, if the latter were the right construction of the will, whether the College was not entitled, under a deed of arrangement between the heir and executor of the founder and the College, to dispose of the whole income. Thirdly, whether the master and four senior fellows ought not to be removed from their office of trustees; fourthly, whether, as against the master and one of the senior fellows, the account ought not to be carried back beyond the period at which the information was filed.

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On the first point, in support of the argument for a rateable apportionment of the surplus rents between the specified objects of the testator's bounty and the master and four senior fellows as trustees of the remainder of the 250*l.*, the distinction between a gift of unascertained residue, and a gift of the remainder of a specific sum, was relied upon, and *Dyose* v. *Dyose* (*a*), *Page* v. *Leapingwell* (*b*), *The Attorney-General* v. *The Mercers' Company* (*c*), *The Attorney-General* v. *The Bishop of Llandaff* were cited (*d*). On the other side *Danvers* v. *Manning* (*e*), *The Attorney-General* v. *Skinners' Company* (*g*), *The Attorney-General* v. *The Corporation of Bristol* (*h*), (where Lord *Eldon* examines all the cases on this subject) *, *The Attorney-General* v. *Gascoigne* (*i*), *The*

(*a*) 1 *P. Wms.* 305.
(*b*) 18 *Ves.* 463.
(*c*) 2 *Bligh, N. S.* 165.
(*d*) cited in *Attorney-General* v. *Ironmongers' Company*, 2 *Mylne & Keen*, 583.
(*e*) 2 *Bro. C. C.* 18. *S. C.* 1 *Cox*, 203.
(*g*) 2 *Russ.* 407.
(*h*) 2 *J. & W.* 319.
(*i*) 2 *Mylne & Keen*, 647.

* "In *The Attorney-General* v. *The Corporation of Bristol*," says Lord *Eldon*, "I took a great deal of pains with this subject; and give me leave to say that, looking back to my judicial conduct, I hope with no undue partiality or self-indulgence, I can never be deprived of the comfort I receive, when I recollect that, in great and important cases, I have endeavoured to sift all the principles and rules of law to the bottom, for the purpose of laying down in each new and important case as it arises, something, in the first place, which may satisfy those, who are concerned as parties, that I have taken pains to do my duty; something, in the second place, which may inform those, who, as counsel, are to take care of the interests of their clients, what the reasons are upon which I have proceeded, and may enable them to examine whether justice has been done; and, further, something which may contribute towards laying down a rule, so as to save those who may succeed to me in this great situation much of that labour which I have had to undergo, by reason of cases having been not so determined, and by reason of a due exposition of the grounds of judgment not having been so stated." *The Attorney-General* v. *The Skinners' Company*, 2 *Russ.* 437.

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The Attorney-General v. *Johnson* (*a*), *The Attorney-General* v. *Catherine Hall* (*b*), *The Attorney-General* v. *Brazen Nose College* (*c*), and *In re Jordeyn's Charity* (*d*), were cited.

On the second point, *The Attorney-General* v. *Pembroke Hall* (*e*) was relied upon by the Defendants.

On the other points, *The Attorney-General* v. *Corporation of East Retford* (*g*) was cited in support of the information, and *Drummond* v. *The Duke of St. Albans* (*h*), *The Attorney-General* v. *The Dean of Christ Church* (*i*), *The Attorney-General* v. *The Mayor of Exeter* (*k*), *Davis* v. *Spurling* (*l*), and *Jemmit* v. *Verril* (*m*), were cited for the Defendants.

The Attorney-General v. *The Haberdashers' Company* (*n*), *The Attorney-General* v. *Dixie* (*o*), and the *Attorney-General* v. *Gascoigne* (*p*), were cited as authorities for the introduction of reading, writing, and other elementary learning into the scheme for the grammar-school.

May 31.

The Master *of the* Rolls.

It appears from the will that the testator, having several benevolent purposes in view, intended them to be

(*a*) *Ambl.* 190.
(*b*) *Jac.* 381.
(*c*) 8 *Bligh, N. S.* 377.; and 2 *Clark & Finn.* 295.
(*d*) 1 *Mylne & Keen*, 416.
(*e*) 2 *Sim. & Stu.* 441.
(*g*) 2 *Mylne & Keen*, 35.
(*h*) 5 *Ves.* 433.
(*i*) 2 *Russ.* 321.
(*k*) 2 *Russ.* 362.
(*l*) 1 *Russ. & Mylne*, 64.
(*m*) *Ambl.* 585. n., *Blunt*'s edit.
(*n*) 3 *Russ.* 530.
(*o*) *Ibid.* 534. n.
(*p*) 2 *Mylne & Keen*, 652.

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be carried into effect by means of the College of which he had been a fellow.

His principal object, however, appears to have been to establish a free grammar-school in *Cambridge*. He gave the land on which the school was to be built, and directed his executors to build it: he further directed that boys educated in the school should have a preference in the election of the scholars on his foundation, and intimated, rather than expressed, a wish that his fellows might, by sufficient authority, be incorporated into the body of the College. He gave to the schoolmaster and usher, and to the scholars and fellows of his foundation, different sums, amounting in the whole to 144*l.*, making considerably more than half of the whole revenue; and the whole scheme appears to me to indicate an earnest desire to encourage the school in close connection with the College.

The master, fellows, and scholars, or, as in another place he calls them, the master and fellows of the foundation, are appointed the supervisors of his will, and his executors, after the death of the persons first appointed. But he wills that the master and four senior fellows do, at all times, execute and perform every thing in his will appointed to be done by the supervisors. He gives to them certain annual sums of money, expressly "for their pains;" and, in a subsequent part of the will, he provides that only the master and four senior fellows shall, after the death of his executors, have the ordering, disposing, election and appointment of all things appointed to his executors or supervisors by his will." The Master and four senior fellows are, therefore, in effect trustees of the will, and of this charitable foundation to be carried on in connection with the College. The power, however, of expelling fellows and scholars

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is expressly given to the master and twelve senior fellows.

It may not unreasonably be supposed that, in establishing the close connection which he did between the school and the College, the testator intended to do that which would be beneficial to both. What pecuniary benefit he intended for the College, is to be collected from the terms of his will, and the mode in which he has directed the distribution of the fixed revenue of 250*l.* a year which he contemplated. The particular sums, of which he directed the application, amounted in the whole to 243*l.* 14*s.* 8*d.*, leaving a remainder of 6*l.* 5*s.* 4*d.* Amongst the particular sums which he gave, were 6*l.* 13*s.* 4*d.* towards the reparation of the buildings of the College then built, or thereafter to be built, and the increase of their stock; the sum of 3*l.* to the master of the College, and the sum of 30*s.* to each of the four senior fellows of the ancient foundation; and he gave the remainder of the 250*l.* to be bestowed in such charitable uses as his executors for their time, and after, his supervisors should think fit.

On the construction of the will, I think that, in the gift of the 6*l.* 13*s.* 4*d.*, the testator treated the College as an object of his bounty; but, in giving the particular sums to the master and four senior fellows, it scarcely appears that he intended to treat them in that character. He imposed on them an onerous duty, and, having regard to the words used in a preceding part of the will, namely, "I give to the said master and four senior fellows, for their pains respectively for ever, the sums of money appointed to them by this my will, desiring them to see the uses of this my will duly performed," I think it appears that he meant to give them, not a mere bounty, but a remuneration for the services which he intended

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intended them to render. And, as to the remainder, I consider it to be no beneficial gift to the College, but a specific direction to bestow it in such charitable uses as the supervisors should think fit; and I think that this direction does not entitle the master and four senior fellows to apply any part of the remainder to their own exclusive use. Being the acting supervisors and trustees of the fund, it was their their right and duty, as such trustees, to apply the remainder to charitable uses; but, being trustees, I am of opinion that they were not entitled to make themselves partakers of the benefit.

This appears to me to be the construction of the will, having regard to the fixed income which the testator contemplated; and I do not think that the effect is materially varied by the subsequent clause of the will in which the testator contemplated a purchase of land in lieu of the particular investment of the 5000*l.* which he intended to be made. He desires that the purchased land should produce 250*l.* a year beyond reprises; but he fixes the trust upon the yearly revenue of the land, and directs the same to be "paid in such manner, to such uses, intents, and purposes as before in his said will was appointed to be paid in perpetuity;" and although, upon the construction of the will, with reference to the increased revenue, it may be doubtful whether we ought to consider the remainder spoken of by the testator as the fixed sum of 6*l.* 5*s.* 4*d.* (being the residue of the 250*l.* a year after deducting the particular payments appointed by the testator) or as the same sum together with its proportional increase in reference to the augmentation, or the whole residue of the augmented income after deducting the fixed payments directed by the will, yet, in any view of the case, it appears to me that the only power, which the master and four senior fellows could possess, would be to direct the

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the charitable purposes to which such residue should be applied, and that they would have no power to apply any part to their own use, any otherwise than as they might be partakers of a proportionate or proper increase of the sum given to the College as a bounty, and probably to increased recompense for increased trouble in the managing a property of increased value.

In cases of this nature, however, it is important to look, not only at the terms of the gift, but also at the circumstances under which the gift was accepted and the foundation established.

It appears that, very soon after the testator's death, the other two executors committed the executorship to *Martin Perse* alone, and that he alone, in concurrence with the College, settled the foundation. The corporations declined the loans which were offered to them; and, on the 17th of *October* 1616, *Martin Perse* covenanted with the master and the four senior fellows that he would, before *Michaelmas* then next, cause to be assured so much land as should be of the yearly value of 250*l.* above reprises, and by common estimation likely to continue so, to the master and four senior fellows, for the performance of the good uses intended by the will; and would, before the same time, cause to be erected the free-school, alms-houses, and causeway mentioned in the will.

Some time after this, *Martin Perse* purchased from Sir *Thomas Bendishe*, for 5000*l.*, the manor of *Frating* and other property, which he afterwards by deed, dated the 6th of *March*, 1618, conveyed to the master and six fellows of the College, on trust to permit the master and fellows to dispose of the same in the performance of the good uses expressed in the will, and thereafter, at such con-

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time as the master and fellows should think fit, to convey the property to the master and fellows and their successors for ever; and by an indenture of even date, *Martin Perse* covenanted that Sir *Thomas Bendishe* should surrender fourteen acres of woodland, being copyhold, to the use of the same trustees upon the same trusts.

By another indenture of the same date (6th of *March*, 1618), and made between *Martin Perse* of the first part, and the master and fellows of the second part, the master and fellows acknowledged that the property conveyed to the trustees was then of the yearly value of 250*l.*, and they accepted the conveyance thereof as a full satisfaction and performance to them of the legacy of 250*l.* per annum; and they released *Martin Perse* and the executors from that legacy of land intended to be purchased with the 5000*l.* This deed, after providing for the then possible case that the corporations might recover some of the sums intended to be advanced to them by way of loan, contained a covenant on the part of the master and fellows, that they would, out of the rents of the property, so far as the same would extend, maintain the good uses mentioned in the will, to be maintained with the yearly revenue of 250*l.*; and that if, by wood sale, or other profit arising out of the property, any sum of money should be raised above the yearly revenue of 250*l.*, the same should be invested in the purchase of lands, the rents of which should be applied in the reparation of the new buildings of *Stephen Perse* in the College, and the free-school and almshouses in the town of *Cambridge*, founded under the will of *Stephen Perse*, and in defraying expenses about the property, or concerning the endowment made by *Stephen Perse* by his will to the College; and lastly, to the bettering of the said good uses appointed by the will to be

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performed with the revenue of 250*l.* per annum, or for the bettering of some of them as to the master and fellows and their successors should seem most fit. The master and fellows then acknowledged that *Martin Perse* had distributed 500*l.* in making a new building in the College for the *Perse* fellows and scholars; and then provision was made for the event which might happen of the rents falling off so as not to produce 250*l.* a year.

In substance this arrangement, instead of providing for the immediate application of any surplus income, provided, first for its investment, and then for the application of the income arising from the investment; and, passing over any question arising from the purchase of woodland and copyhold property, for which (if I correctly understand the transaction) freehold was afterwards substituted, it does not appear to me that the arrangement was in any way improvident or improper. In the beginning, it was much more safe and prudent to make some investment of the surplus, instead of making an immediate application of the whole, and the purposes, for which the income arising from the investment were to have been applied, seem to have been right.

It is, I think, to be collected from the deed, that *Martin Perse* and the College at that time considered that 250*l.* a year was the whole amount which the testator intended to apply to the charitable uses mentioned in his will. If this were strictly so, the surplus would have had to be applied to such charitable purposes as the College should direct; but, by this deed, the College covenanted that, after repairs and expenses were satisfied, the income to arise from the investment of the surplus should be applied in bettering the good uses appointed by the will, or some of them, as the College should direct.

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Now it has often been declared in this Court, that a college is under no obligation to accept an accession to its foundation, or any other trust; that, if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust; but that, if there are questions upon the original instrument of foundation, and an arrangement be fairly made at the time of acceptance, and is evidenced either by contemporaneous instruments, or even by constant subsequent usage, which may be considered as evidence of such arrangement, then the Court will not disturb it, although in its own view of the original instrument, that arrangement was in effect some modification of that which might now be considered the best construction of the original instrument. And, looking at the case with reference to these considerations, though I might in some degree differ in opinion from those who agreed to this arrangement of *March* 1618, I should not think myself at liberty to disregard it. It was, I think, a reasonable arrangement for carrying into execution the trusts of the will, and although the mode of accumulation, if constantly pursued, would after a certain time lead to inconvenience requiring a check, and some new regulation under the authority of this Court, yet, as to the application of the revenue, I see nothing to object to it, as a term on which the executors conferred, or the College accepted the trust; and, if that mode of application had been pursued in the spirit in which it was directed, I think that there would have been no just ground of complaint, and that it would not have been proper for me to make the sort of decree which, under the present circumstances, the case appears to me to require.

It would appear that, soon after the testator's death, Mr. *Martin Perse*, in performance of the will and of his

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own covenant in the deed of 1616, erected a school-house and lodgings for the schoolmaster and usher. The school-house and lodgings did not occupy the whole of the land destined for them, and, on the 20th of *April* 1621, the executors and devisees in trust of *Stephen Perse* demised a portion of the land to *Robert Allot*, for fifty-years, for the purpose of raising a yearly rent to be bestowed for and towards the reparation of the free school; and there can, I apprehend, be no doubt that the whole revenue derived from the property was properly applicable to the purposes of the school alone.

In *February* 1623, ordinances for the government of the school were made by the executors and the judges of assize.

In *November* 1657, the survivor of the trustees named in the deed of *March* 1618, conveyed the estates therein comprised to the master and fellows of the College; but it does not appear that any thing further was done with the property in *Free School Lane*, or in whom the inheritance of that property is now vested.

In the year 1686 Mr. *George Griffith* gave to the master and fellows 100*l.* to be employed for a supplement to the revenue of the free school.

The foundation of the charity being such as I have stated, it appears from the proceedings in this cause that there have been considerable errors and irregularities in the management of the property, in the distribution of the income, and more particularly in the conduct and management of the school. The Defendants admit at the bar that it has been so, and they are so far from interposing any obstacle to the due regulation of the charity

charity that they offer to give every facility for that purpose.

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Under these circumstances it is clear that there must be a reference to the Master to approve of a scheme for the application of the income of the property belonging to this foundation, and for the conduct and management of the school, and that there must be an account of the receipts and payments of the Defendants. But the relators, in the name of the Attorney-General, insist that, besides this relief, the master and fellows of the College ought not to be allowed to act as trustees of the property; and that, as against the master, and one of the fellows, the account ought to be carried much farther back than the filing of the information. And some questions are raised respecting the declarations which ought to be made for the guidance of the Master in settling the scheme; respecting the proper inquiries for ascertaining the property, and respecting the costs of the suit.

Upon the question whether there ought to be new trustees, I am of opinion that I ought not to apply to the case any such general principle or general reasonings as have been urged at the bar. It is not for me to consider whether corporations or colleges are or are not, in a general view, well or ill qualified to be trustees. The founders of many charitable institutions have thought fit to appoint colleges to be trustees of their foundations; the law has allowed this to be done, and courts of equity are not, in my opinion, at liberty to say that this shall not be done, upon the notion that, when individuals are trustees, there is a greater personal responsibility. How little that personal liability is in many cases available, experience shews us; but I consider it clear that these are not considerations, which this Court is at liberty to

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resort to on such questions; and I cannot admit the validity of the argument, which, after all the errors and misapplications that upon a careful examination of the original documents appear to have been committed by the present members of the College and their predecessors for two centuries past, affirms that every error was wilfully committed, and infers, from the total amount of them, that the present members of the College or corporation and their successors in all time to come are and will be incompetent faithfully to fulfil the office of trustees. On the other hand, when I see how anxiously the founder in this case has connected his foundation with the College, and the utter impossibility of separating one from the other without defeating his plain and manifest intention, I conceive it to be perfectly clear that the College cannot be removed from the office of trustees on any of the grounds stated, and it does not appear to me that the circumstances of this case make it fit to accede to the proposal which has been made to appoint new trustees without prejudice to the rights of the College as supervisors, or that any real advantage would be gained by it. It seems to me that, whatever regulations might be made in that respect, the effective administration must, consistently with the testator's intention, substantially remain with the College, and that, after all that can be done, the right of resorting to this Court would, as in other cases of trust, afford the only real and effective security for the due administration of the trust.

With respect to the accounts as against the College and the Defendants Messrs. *Turnbull*, *Musgrave*, *Houlditch* and *Thurtell*, nothing more is asked than an account from the filing of the information. But with respect to the master of the College and Dr. *Woodhouse*, it is asked that they should be ordered to refund certain sums which they

they have received beyond the amount of what was justly payable to them.

As to the allegation on which this demand is made, I am under the necessity of saying that, after considering the nature of this foundation and the facts stated in the answer, it does, in my present view of the case, appear to me that considerable over-payments were made to the master and four senior fellows of the College before the year 1830; but, notwithstanding that, considering all the circumstances of this case—that the first deviation from the letter of the will in favour of the master and four senior fellows was made in the year 1787, before the present master was made a member of the College—that the alterations in 1804 and in 1812, in which the present master concurred, were made in conjunction with the four senior fellows at those times respectively, and who are not now before the Court—that the alteration in 1825, in which the present master and Dr. *Woodhouse* partook, were made in concurrence with three other senior fellows, who are not now before the Court and one of whom has been dismissed from the suit since its institution—considering further, that the amount which, in reference to all the circumstances of this case, the master and four senior fellows might have been justified in receiving has not been ascertained, but is now subject to question, so that the amount of over-payment is even at this time unknown, and conceiving that the excess cannot under the circumstances of this case be fairly measured by the advance from the previous payment—considering also that, in 1830, when the objectionable nature of what had been done was first brought to the attention of the master and four senior fellows, a correction (whether adequate or not) was *bonâ fide* undertaken to be applied and was in fact applied—having regard also to the admissions, properly made at the bar, that no corruption

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or improper motive is chargeable against any of the parties in this cause, and that every facility is now offered in placing the matter upon a proper footing, I am of opinion that I should deviate from the principles on which the Court has acted in such cases, if I were to direct the account to be carried back against the master and Dr. *Woodhouse* in the manner that has been asked.

With respect to the declarations, which ought to be made, it appears to me that they should be so far particular as to call the attention of the Master distinctly to the property to be applied, and to the purposes to which it is applicable; and, under the circumstances of this case, I think that I cannot properly make a decree leaving to the Defendants so much discretion as was done in the case of *Jemmit* v. *Verril.* (*a*) I therefore propose to make a declaration almost in the terms which have been asked by the relators in the name of the Attorney-General. (See declaration, p. 170.)

The costs of the suit remain to be considered. The relators must have their costs out of the fund. They do not ask any costs against the Defendants, but they desire that all the Defendants should be made to bear their own costs of these proceedings.

On what ground this is desired against the Defendants Messrs. *Turnbull*, *Musgrave*, *Houlditch*, and *Thurtell*, has not been stated; it is desired against the College, the master of the College and Dr. *Woodhouse*, on account of their participation in those acts which now appear to be breaches of trust.

I should be sorry to say any thing from which it could be inferred that corporations and colleges are not bound

(*a*) *Ambl.* 585. n. *Blunt*'s edit.

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bound strictly to perform the trusts they undertake; but it is evident that, in charging corporations consisting of fluctuating members, they cannot be dealt with as individual persons; for, by doing so, we should visit the present members with the consequences of errors committed by their predecessors, whom they do not in any respect represent; and in every case of this sort, we must look at all the circumstances. There are errors and misapplications such as have been dwelt on at the bar; all of them had their origin before any of the present Defendants came into the College; some of them have been greatly aggravated since, and what has been done particularly in regard to the school and the school-house cannot be considered without very great regret; but it appears to me clear from the answers, that, in the ignorance in which all the parties were as to the particular regulations which they ought to have followed or made, they really, when they were acting most erroneously, thought themselves acting fairly even with regard to the school, and at liberty to do all that they did. Their attention was never seriously drawn to the subject till the year 1830; and they then began to inquire for the documents, by which they were to be guided. They were prosecuting those inquiries, and obtaining the advice necessary for their guidance, when, without any previous application being made to them, this information was filed, and their proceedings were arrested. In the year 1830 they had, without suit, altered the distribution which has been, as I think, justly complained of. They then adopted a new distribution, the propriety of which is certainly open to question, but which was meant to put an end to all breach of trust; and, for any thing which I can clearly see to the contrary, they might, from the course they were pursuing, have proceeded to place (as it undoubtedly was their duty to place) the school upon a proper footing without the interposition of

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of this Court. Moreover, notwithstanding the errors committed, the College, as trustees, have, by their care, accumulated from the income of this property the several funds mentioned in the answer of Mr. *Thurtell*, namely, 25,100*l.* 3 per cent. annuities, 2400*l.* South Sea annuities, and 5000*l.* Exchequer bills. This accumulation is, amidst all the errors which have been committed, the result of the care and economy of the trustees, and now remains applicable to the purposes of the foundation, to the great advantage, as I hope, of the school, and the other objects of the testator's bounty.

Under all these circumstances, though I certainly have hesitated very much, yet, on the whole, it appears to me that I shall not do wrong in allowing these Defendants their costs of this suit out of the fund which has been accumulated and preserved for the foundation by the care and economy of themselves and their predecessors.

Declare that the lands and funds now in the possession of the College, as trustees or supervisors of Dr. *Perse*'s will, except as to 100*l.* part of such fund, are subject to the trusts of the will of Dr. *Perse;* and that the sum of 100*l.* is subject to the trusts of the will of Mr. *Griffith;* that the school-house and the other houses, situate in *Free School Lane* in *Cambridge*, together with the income arising from such part thereof as shall not be occupied for the purposes of the school, and the lodgings of the master and usher, and the interest of the 100*l.* bequeathed by the will of Mr. *Griffith*, are applicable exclusively to the purposes of the will. Refer it to the Master to inquire what the property, other than the property in *Free School Lane*, and the 100*l.* bequeathed

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queathed by the will of Mr. *Griffith*, now consists of, and in whom the same is now vested, with liberty to state special circumstances. Declare that the whole income of such property, after setting apart a proper sum to answer the contingencies, ought to be divided amongst the several objects mentioned in the will of Dr. *Perse*, or such of them as are now subsisting; and that, in the distribution of the income among such objects, the master and fellows are entitled to apply, to such charitable objects as they think fit, such share of the said income as shall bear to the whole thereof the same proportion as the sum of 6*l.* 5*s.* 4*d.* shall bear to the sum of 250*l.* Refer it to the Master to approve of a scheme for the general administration of the property, and for the application of the income of the trust-fund; the Master, in approving of a scheme for the application of the income, to be at liberty to vary the proportions in which the income is to be apportioned among the subsisting objects; and the master and four senior fellows of the college to be at liberty to claim an increased allowance for their pains. Refer it to the Master to approve of a scheme for the future conduct and management of the school, having regard to the share of the general income which shall be allotted to the master and usher, and to the income to arise from the property in *Free School Lane*, and the 100*l.* bequeathed by the will of Mr. *Griffith*; and the Master, in settling the scheme, to be at liberty to approve of a plan for adding instruction in writing and arithmetic to instruction in grammar, and other learning fit to be taught in a grammar school. The Attorney-General and the Defendants to be at liberty to propose schemes for the purposes aforesaid, for the consideration of the Master.

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July 17, 18.

MATHER *v.* SCOTT.

It is contrary to the policy of the mortmain act to permit testamentary gifts of money to be laid out on land, as an inducement to draw land into mortmain.

A testator gave the residue of his personal estate to his executors and other persons, with a request that they would be pleased to entreat the lord of the manor of *Devonport* to grant a spot of ground suitable for the erection of dwellings to be appropriated to a charitable purpose.

Held, that the bequest did not clearly exclude a purchase of the land; and that, even if it did, it was void under the statute of mortmain.

THE residuary clause of the will of *Thomas Spearman* was in the following words: — "As to all the residue of my property whatsoever, whether money vested in public funds or otherwise, houses or land, plate, household furniture of every description (the latter to be sold when my executors may think fit, and the amount arising from the same to be invested in the public funds), I give the same to the chaplains of his Majesty's dock-yard at *Devonport*, and of the Royal Hospital of *Stonehouse*, for the time being, in conjunction with my executors or their representatives, with a request that they will be pleased to entreat the lord of the manor, either at *Devonport* or *East Stonehouse*, to grant a spot of ground suitable for the erection of as many decent dwellings or rooms, something like the charity known by the name of *Twelves*, in the parish of *Charles* in *Plymouth*, for the residence of as many deserving indigent females of the parish of *Stoke Damerel* and *East Stonehouse*, followers of the Established Church of *England*, and not under the age of sixty years, as they may deem proper objects of their charity, with an allowance of 12*l.* per annum to each annuitant, so long as they conduct themselves soberly and orderly, and thereby proving they are worthy of the same; regulating the number so as to correspond with the amount of property so left, after the dwellings are provided."

The bill was filed by the Plaintiff, who was the heir at law and next of kin of the testator, against the chaplains described in the will, the executors, the Attorney-General, and other parties; and the question in the cause

cause was, whether the bequest of the personal estate was void under the statute of mortmain. It was admitted that the gift was void, so far as related to the real estate.

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Mr. *Pemberton*, for the Plaintiff.

The law to this extent is clearly settled, that money may be left to be laid out in improving land already in mortmain, but that a gift of money to be laid out for the purpose of building generally is void, because it is implied that the building is to take place on land not already in mortmain. It is not, however, entirely settled by the authorities, whether money may be left to be laid out in building upon and improving land, provided land can be obtained as a gift for that purpose.

The first question is, whether the testator intended that no part of the money should be laid out in land; and supposing that to have been his intention, the next question will be, whether a gift of money under the expectation of procuring land to be given, to be employed in building upon the land so procured, can take effect consistently with the statute.

There is nothing in this will which excludes an intention that the money was to be laid out in procuring the land. The direction to the chaplains and executors, that they will be pleased to entreat the lord of the manor to grant a suitable spot of ground for the purpose of the buildings, is not inconsistent with the intention that the lord should be entreated to sell the land; for the grant of a particular spot of land might well be a favour, though a consideration was paid for it. Unless the testator has indicated an intention that no part of his personal estate shall be laid out in land, all the authorities shew that the bequest is void.

Supposing,

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Supposing, however, that intention to appear upon the will, and that the testator was desirous of procuring, not the purchase, but a gift of the land, can the Court give effect to a bequest of money to be laid out in building upon land procured as a gift? Upon this point the authorities are not altogether consistent or reconcilable with each other. In the *Attorney-General* v. *Bowles* (*a*), Lord *Hardwicke* decided that a bequest of money to be laid out in erecting a school-house was good, upon the ground that, if a piece of land could be obtained by the gift or generosity of any person, the statute would not apply; and if that decision were law, there would be no question as to the validity of the bequest in this will, supposing the testator to have contemplated a gift, and not a purchase of the land. But Lord *Hardwicke*'s decision has not been followed, and the *Attorney-General* v. *Bowles* may be considered as overruled by the subsequent cases of the *Attorney-General* v. *Tyndall* (*b*), and *Chapman* v. *Brown*. (*c*) In the latter case, Sir *William Grant* held that, where there was a bequest for building, and no particular land appeared to be in the contemplation of the testator, it could not be presumed that he intended the building to take place on land already in mortmain. If the testator directs money to be laid out in building upon land already in mortmain, the bequest is good; *The Attorney-General* v. *Munby*. (*d*) In *Henshaw* v. *Atkinson* (*e*), the testator gave a sum of money for the benefit of a blue-coat school and blind asylum, which he wished to be erected and established; but he directed that the money should not be applied in the purchase of lands, or the erection of buildings, it being his expectation that other persons would, at their expense, purchase lands and

(*a*) 2 *Ves.* sen. 547.
(*b*) *Ambl.* 614.; and 2 *Ed.* 207.
(*c*) 6 *Ves.* 404.
(*d*) 1 *Mer.* 327.
(*e*) 3 *Mad.* 306.

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and buildings for those purposes. Sir *John Leach* held that this bequest was not void under the mortmain act. And in *Johnston* v. *Swann* (*a*), the same learned Judge held that a bequest of the dividends of stock to be applied in providing a proper school-house was good, because the school-house might be hired. In the later cases the rule appears to have been laid down, that a bequest for the purpose of building is void, unless the testator distinctly points to land already in mortmain; *Pritchard* v. *Arbouin* (*b*), *Giblett* v. *Hobson.* (*c*)

Mr. *Tinney* and Mr. *Kenyon Parker*, for the widow of the testator.

Mr. *Wray*, for the *Attorney-General.*

Mr. *Temple* and Mr. *Sharpe*, for the trustees.

Many of the decisions in this class of cases appear to have been made under a strong impression, on the part of the Court, that bequests for charitable purposes more frequently originate in the vanity of testators than in any real desire to benefit the poor; that such dispositions of property, generally made at the expense of the testator's nearest relatives, ought rather to be discouraged than favoured, and that the fullest effect, therefore, ought to be given to the statute of mortmain, the design of which was to prevent persons, out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls, to give their lands, or monies to be invested in lands, to charity, which in their lifetime they had wholly disregarded; *Attorney-General* v. *Lord Weymouth* (*d*), *Attorney-General* v. *Tyndall.* (*e*) In giving effect

(*a*) 3 *Mad.* 457.
(*b*) 3 *Russ.* 456.
(*c*) 5 *Sim.* 651.; and 3 *Mylne & Keen*, 517.
(*d*) *Ambl.* 20.
(*e*) 2 *Ed.* 207.

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effect to such views of the inexpediency of bequests to charitable purposes, some of the decisions appear to have proceeded upon a principle, not entirely reconcilable with the rule of law which prevails in all other cases, namely, that the presumption shall be in favour of, and not against the legality of an intention, until the contrary appear. The law presumes against fraud, or unlawful intention in all other cases; why should a charitable bequest be the single case of exception in which, if a testator contemplates the acquisition of land, and does not direct an unlawful mode of acquiring and disposing of it, he shall be presumed to intend that unlawful mode by which his own gift may be defeated? That is the principle, it must be admitted, upon which some of the more recent decisions have proceeded; but Lord *Hardwicke* was of a different opinion, and thought that the presumption ought to be in favour of the lawful intention, where no unlawful intention was expressed; *Attorney-General* v. *Bowles*. (*a*)

Supposing the authority of Lord *Hardwicke* to be displaced by the subsequent decisions of Lord *Northington* and Sir *William Grant*, the present case does not fall within those decisions, because the testator has used expressions which are inconsistent with that unlawful intention which might, according to the recent cases, in the absence of such expressions, have been presumed. It is impossible, if the testator had intended that his trustees should enter into a treaty with the lord of the manor for the purchase of the land, that he should have directed them to entreat the lord to grant a spot of ground. An entreaty to grant naturally implies a solicitation for the gift, not a negotiation for the purchase of the land.

If,

(*a*) 2 *Ves.* sen. 547.

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If, then, the land was intended to be procured as a gift, the question is whether a bequest for the purpose of erecting dwellings on land so procured is not a valid bequest. It is admitted, on the other side, that there is no express authority against the validity of such a bequest; and we contend that *Henshaw* v. *Atkinson* (*a*) is an authority in support of it. In that case, the testator directed that lands should not be purchased with his money, and expressed an expectation that other persons would purchase the lands and buildings required for the purposes of the charity, which he desired to found. In the present case, the testator has used expressions, equivalent to a declaration that the land required for the dwellings shall not be purchased, and which indicate an expectation, or earnest desire, that the land may be given by the lord. The two cases, therefore, are not distinguishable; and, in the absence of any authority to the contrary, this bequest ought, it is submitted, to be sustained.

Mr. *Pemberton*, in reply.

The authority of *Henshaw* v. *Atkinson* is considerably shaken by *Giblett* v. *Hobson* (*b*), the last decided case upon this subject. In that case the testator bequeathed money to a charitable institution "towards building almshouses to the said institution," and it appeared by evidence, which was held to be admissible by Lord *Brougham*, that a piece of land for the erection of almshouses had actually been offered and accepted by the members of the institution, of whom the testator was one. The Vice-Chancellor decided that the bequest was void, and that decision having been appealed from, it was laid down by Lord *Brougham* that the *onus* of shewing

(*a*) 3 *Mad.* 305.

(*b*) 5 *Sim.* 651.; and 3 *Mylne & Keen*, 517.

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shewing that the intention of the testator was restrained within lawful limits was upon the party seeking to take the bequest out of the statute; and that in one way or another, but especially where it was to be by matter *dehors*, the intention must appear absolutely certain and clear to exclude the employment of the fund in purchasing land, and must not be a matter of speculation and conjecture." And, even with the aid of the extrinsic evidence, Lord *Brougham* did not consider such an intention to be sufficiently clear, and be accordingly affirmed the Vice-Chancellor's decision. In the present case it is impossible to contend that there is, upon the face of the will, as strong an indication of the testator's intention to exclude the employment of the money in the purchase of land as there was upon the language of the will in *Giblett* v. *Hobson* coupled with the extrinsic evidence, which was admitted in order to explain the doubtful expressions of the testator.

July 18. *The* MASTER *of the* ROLLS.

The question in this case arises on the will of *Joseph Spearman*; and it is objected, and indeed admitted, that the intention of the testator cannot be carried into effect without bringing land into mortmain, and that is to be done by means pointed out by the will of the testator.

The testator gives the residue of his property to the chaplains of his Majesty's Dock-yard at *Devonport*, and of the Royal Hospital at *Stonehouse*, for the time being, in conjunction with his executors or their representatives, with a request that they will be pleased to entreat the lord of the manor, either at *Devonport* or *East Stonehouse*, to grant a spot of land suitable for the erection of dwellings to be appropriated to the charitable purpose mentioned in the will.

The

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The first question is whether the expressions used by the testator imply an expectation or intention that a gratuitous grant of the land was to be obtained from the lord of the manor. I think this is by no means clear, and that the language of the testator did not exclude the trustees from purchasing the land, if they thought proper; and, if so, the bequest would be void.

As to the second point raised at the bar, it is settled that a bequest to improve land already in mortmain is good, and that a direction to build for charitable purposes implies that land is to be bought, and is, therefore, void. The question here is whether a bequest of money to be laid out in building upon land, which the testator expected to be procured as a gift, can be supported. I do not think that the case of *Henshaw* v. *Atkinson* is an authority in support of such a bequest, because the decision proceeded upon the codicils, from which it was to be collected that the expectation of the testator as to the purchase of lands and buildings by other persons had been disappointed, and that he contemplated making other provisions for the establishment of the charities.

In the absence of direct authority, I must look to the object of the statute, and to the opinions of the judges as they are to be collected from the cases. With the exception of Lord *Hardwicke*, whose opinion as to this point in *The Attorney-General* v. *Bowles* has not been followed, all the judges — Lord *Eldon*, Sir *William Grant*, and Lord *Lyndhurst* — concur in one view of the subject, that a bequest to improve or build upon land, unless the land is already in mortmain, is bad.

In *The Attorney-General* v. *Davies* (*a*), Lord *Eldon* says, "whatever were the decisions formerly when charity

(*a*) 9 *Ves.* 544.

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charity in this Court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that, unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good."

In *Pritchard* v. *Arbouin* (*a*), Lord *Lyndhurst* says, "it is the settled rule of construction, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to some land, which is already in mortmain."

It is said that the direction to the trustees to be pleased to entreat the lord to grant a piece of ground does not bring this case within the principle; but I am of opinion that, if the testator intended to exclude a purchase, he has failed to express his intention; and that it is contrary to the policy of the mortmain act, to permit testamentary gifts of money to be laid out on land, as an inducement to draw land into mortmain.

I am of opinion, upon the first point, that the language of the bequest is not sufficiently express; and, upon the second, that the charitable gift must fail.

(*a*) 3 *Russ.* 458.

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In the Matter of RICE.

May 23.
Aug. 2.

THE petition was presented by *Louisa Ann Brooks*, and it prayed that the bill of costs, which had been delivered to the petitioner by *Edward Rice* her solicitor, might be taxed, and that *Edward Rice*, upon payment by the petitioner of what should appear to be justly due to him, might be ordered to deliver up all deeds and papers belonging to the petitioner, which had come into his possession during the time he was professionally employed by her. It appeared that the bill of costs was for conveyancing and general business, and did not include any charge incurred in the prosecution or defence of any suit or action. Many of the items were disputed by the petitioner, but Mr. *Rice* refused to deliver up the deeds and papers in his possession, until he received payment of the whole amount of his bill.

Where a solicitor refuses to deliver up deeds and papers in his possession, except upon payment of his bill of costs, the Court has jurisdiction to order taxation of such bill, and the delivery up of the deeds and papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing and other general business, and not in respect of the prosecution or defence of any suit or action.

Mr. *Coleridge*, in support of the petition.

It has been determined in several cases, that, where business has been done by a solicitor, though not in respect of any action or suit, the Court has jurisdiction to order the solicitor to deliver up deeds and papers in his possession, upon satisfaction of any lien he may have for costs; and, to ascertain the amount of such lien, taxation is requisite: *Ex parte The Earl of Uxbridge* (*a*), *In re Murray* (*b*), *In re Barker*. (*c*) In *Ex parte Partridge* (*d*), there being no detention of the title deeds, and nothing in dispute but the amount of costs, Lord *Eldon* refused to interfere; but he distinctly recognised

(*a*) 6 *Ves.* 425.
(*b*) 1 *Russ.* 519.
(*c*) 6 *Sim.* 476.
(*d*) 2 *Mer.* 500.

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recognised the jurisdiction of the Court, if there had been a refusal on the part of the solicitor to deliver up the deeds. At law, the summary jurisdiction of the Court over its officers, in matters connected with their professional character, has been carried still further than in this Court, for the Court of King's Bench has compelled an attorney, not only to give up deeds in his possession, and to deliver a bill of costs, but to account for his receipts and disbursements, though none of the costs had been incurred in respect of any action or suit: *In the matter of Aitkin.* (*a*)

Mr. *Pemberton* and Mr. *Norton*, *contrà*.

An application, similar to that now made by petition, was made to the Court of Common Pleas, and refused by that Court. The matter, therefore, is *res judicata*; and, having been disposed of by a Court of competent jurisdiction, cannot be again brought, by way of appeal, before this Court. In *Cocks* v. *Harman* (*b*), the Court of King's Bench refused to interfere, in a summary mode, to compel an attorney to deliver up papers, which, if improperly detained, were the subject matter of a bill in equity or an action; and *In the Matter of Lowe* (*c*), there being no imputation of improper conduct against the attorney, the same Court also refused to exercise its summary jurisdiction. This case is distinguishable from those which have been cited, because here, the papers came into the hands of Mr. *Rice*, not in his character of solicitor, but in his character of conveyancer, and over conveyancers this Court has no jurisdiction; nor are the charges made by a conveyancer for business, done in that character only, a proper subject of taxation. If any reference to the Master is made upon this petition, as the only complaint against the bill is, that it contains items

(*a*) 4 *B. & Ald.* 47.
(*b*) 6 *East*, 404.
(*c*) 8 *East*, 237.

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items with which the petitioner is not properly chargeable, the reference ought to be for an inquiry whether the bill contains any improper charges. Moreover, as the bill delivered to the petitioner was not framed with a view to taxation, and many items are omitted, in the expectation that there would be no taxation, which would have been fairly introduced if taxation had been contemplated, Mr. *Rice* ought to have an opportunity of delivering to the petitioner a new bill of costs.

Mr. *Coleridge*, in reply.

In the case of *In re Murray*, the bill of costs was entirely for conveyancing business, and the same objection, which is now taken upon that ground, was made without success.

The Master *of the* Rolls considered the authority of *In re Murray* conclusive, and ordered that, the petitioner undertaking to pay what, if any thing, should be found due to *Edward Rice* on the taxation of his bill of costs, it should be referred to the Master to tax the same; and that *Edward Rice* should, upon payment by the petitioner of what, if any thing, should be found due to him upon such taxation, deliver up to the petitioner all deeds and papers in his possession or power, belonging to the petitioner.

The costs of the petition, and of the taxation, depending on the result of the taxation, were reserved.

Aug. 2.

The Master having disallowed, upon the taxation, more than one third of the whole amount of the bill of costs, *Louisa Ann Brooks* obtained an order, upon petition, for payment of the taxed costs of the original application, and of the taxation, and of the second petition.

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June 1.
Aug. 5.

JONES *v.* JAMES.

Where a Plaintiff brought an action against his solicitor, and the solicitor pleaded a set-off in respect of his bills of costs, and the proceedings in the action, and under a reference to arbitration, in which all questions as to the solicitor's bills of costs might have been determined, failed, and the Plaintiff afterwards, in this Court, obtained an *ex parte* order to tax his solicitor's bills of costs, and to have the deeds which were in the possession of his solicitor delivered up, a motion to discharge that order was refused, but without costs, as the Plaintiff ought to have made a special application.

FOR some years before the year 1834, Mr. *John Harris*, a farmer in *Carmarthen*, had employed Mr. *James Thomas* as his attorney and solicitor in several transactions, and having, as he conceived, reason to complain of his professional conduct, he, in the month of *April* 1834, brought an action in the Court of Exchequer against him, to recover compensation for his alleged negligence and bad advice, and also to recover certain sums received by him on account. *Thomas*, amongst other things, pleaded the statute of limitations, and a set-off for his bills of costs. It was held that, under the statute of limitations, the Plaintiff was precluded from recovering on the special counts in his declaration, and by an order at *Nisi Prius*, dated the 12th of *July* 1834, the matters of account were referred to arbitration, and it was ordered that the arbitrator was to settle all matters in difference between the parties touching the Defendant's bills of costs and all the Plaintiff's demand on the Defendant, with power to the arbitrator to have the Defendant's bills taxed, and to ascertain the balance between the parties, and direct by, and to whom, and when the same should be paid, but no question of liability was to be raised.

On the 3d of *October* 1834, the arbitrator directed the bills of costs to be taxed; and, accordingly, the proper officers proceeded to consider the reasonableness of the charges. In the course of the taxation it was discovered that Mr. *Thomas*, though an attorney of the court of great sessions, had not been admitted an attorney in any of the courts at *Westminster*, till after some part of

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of the business charged for had been done, and an opinion was expressed by the officer that such charges ought not to be admitted, but he referred the matter to be decided by the arbitrator.

In *December* 1835, the arbitrator awarded that a balance of 170*l.* 12*s.* 6¼*d.* was due to the Plaintiff from *Thomas*, and ordered payment of that sum, and delivery up of the deeds and papers in *Thomas*'s possession.

Thomas alleged that this balance could not have been found, if the arbitrator had not deducted the charges for business done before the Defendant was admitted in the courts at *Westminster*; and that under the words of the reference "no question of liability is to be raised," he had no authority to make such a deduction; and on this allegation, a rule *nisi* to set aside the award was granted by the Court of Exchequer, and was afterwards made absolute, unless the Plaintiff agreed to go before the arbitrator again, to have the balance of the whole accounts ascertained by him.

The Plaintiff refused to accede to this, and attempted to go on with the action, as if no award or order of reference had been made. The Defendant thereupon obtained a rule *nisi* to stay all proceedings in the action, on the ground that, under the circumstances, the action had been determined, and this rule was made absolute; the Court, however, still intimating that the parties might, if they pleased, go again before the arbitrator on the terms before suggested.

The award being set aside, and the action determined, and the Plaintiff not thinking fit to go again before the arbitrator, he obtained, in this Court, the common order to tax Mr. *Thomas*'s bills, and to have the deeds and papers in his possession delivered up; and a motion

was

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was now made, on behalf of Mr. *Thomas*, to discharge that order, as having been improperly obtained, on the ground that the bills of costs formed part of the subject of the action, and were disposed of by the Court of Exchequer; and that, if any thing remained undisposed of, Mr. *Harris* ought to have applied to that Court.

Mr. *Kindersley* and Mr. *James*, in support of the motion.

Mr. *Pemberton*, and Mr. *E. V. Williams*, *contrà*.

The MASTER *of the* ROLLS said that if there was a pending proceeding in which the matter could be properly determined, this Court would not interfere with the jurisdiction which had possession of it; but it appeared to him that both the action and the reference to arbitration were, in effect, at an end. The rule *nisi* to stay the proceedings in the action, on the ground that the action had determined, had been made absolute by the Court of Exchequer. The rule *nisi* to set aside the award had also been made absolute; and, though the proceedings before the arbitrator might, under the order of the Court of Exchequer, have been revived with the consent of both parties, one of them having refused to revive those proceedings, the award remained a nullity. If there was no pending proceeding before another competent tribunal, Mr. *Harris* had a right to apply to this Court for the taxation of his solicitor's bills of costs for the purpose of recovering the deeds which were in the possession of his solicitor; but his Lordship thought that Mr. *Harris* should have made a special application, instead of obtaining the common *ex parte* order for taxation. His Lordship said he should not finally dispose of this motion until he had read the affidavits.

The

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It is clear, under the circumstances, that the proceedings in the Court of Exchequer did not determine any thing as to the bills of costs. They were in question, and might have been finally disposed of in that action; but the proceedings wholly failed by the setting aside of the award, the determining the action, and the refusal of the Plaintiff to revive the proceedings before the arbitrator.

The failure of the proceeding does not deprive the Plaintiff of his right to obtain his deeds and papers on payment of what is due to his solicitor, or to have the amount of what is due ascertained by taxation, and I am of opinion that the order which the Plaintiff has obtained ought not to be discharged; at the same time I think that the Plaintiff ought not to have obtained the common order *ex parte*, but ought to have stated the special circumstances; and, in consequence of his having omitted to do so, though I refuse the motion, I think it right to do so without costs.

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April 4. 15.

BOSWELL *v.* TUCKER.

The Plaintiff obtained an order to amend, without requiring a further answer, amending the Defendant's office copy. The amendments required a new engrossment, and the Plaintiff, without having called on the Defendant for his office copy, paid 20*s.* costs for the amendments, which were accepted by the Defendant's clerk in Court, and after eight days filed his replication.

The acceptance by the Defendant's clerk in Court of the costs of the amendments was a waiver of the Plaintiff's omission to call for the Defendant's office copy, and a motion, on the part of the Defendant, for leave to answer notwithstanding the replication, was refused, but without costs.

A MOTION was made, on the part of the Defendant, that the Plaintiff's replication might be withdrawn, and that the Defendant might answer the amended bill; or that the Defendant might be at liberty to answer, notwithstanding the replication. The Plaintiff, on the 6th of *February* 1837, obtained an order to amend his bill, without requiring a further answer, amending the Defendant's office copy; and, on the 17th of the same month, the order was served on the Defendant. The amendments required a new engrossment, which was put upon the file; and, on the 24th of *February*, the Plaintiff paid 20*s.* costs to the Defendant's clerk in court, who accepted the same. The Defendant having taken no step, the Plaintiff, on the 10th of *March*, filed the replication. The Defendant made an affidavit that he expected to be called upon for his office copy to be amended, and that he never was so called upon.

Mr. *G. L. Russell*, in support of the motion.

In *Woodhouse* v. *Meredith* (*a*), the plaintiff amended his bill, without requiring a further answer; and the objection was taken at the hearing that, though the plaintiff had served the defendant with the order to amend, he had neglected to call upon him for his office copy, in order that the necessary alterations might be made in it. The irregularity was admitted, and the objection was only disallowed, because the defendant had not taken it till the hearing. Here the Plaintiff has failed to comply

(*a*) 1 *J. & W.* 204.

ply with the express condition on which the order to amend was made; and the Defendant, relying on the Plaintiff's compliance with the terms of the order, was, at the time when the Plaintiff filed his replication, in ignorance of the state of the record.

Mr. *Hallett, contrà.*

Notice to the Defendant's clerk in court was notice to the Defendant, and, by the practice of the Six Clerks' Office, the acceptance of the 20*s.* costs by the Defendant's clerk in Court waives any irregularity in the order, even though the order may have been obtained in direct opposition to a prohibitory order of the Court; *Tarleton* v. *Dyer.* (*a*) By the 14th of the New Orders of 1833, the Defendant had eight days to consider whether he would answer the amended bill, at the end of which time the Plaintiff was at liberty to file a replication. Here the Plaintiff did not file the replication until fourteen days had elapsed from the time at which the costs of the amendments were accepted. The suit is a foreclosure suit, and the estate is not sufficient to satisfy the incumbrance.

April 15.

The MASTER *of the* ROLLS said he would inquire into the practice; and, on a subsequent day, his Lordship said, that the acceptance, by the Defendant's clerk in court, of the 20*s.* costs for the amendments, was a waiver of the Plaintiff's omission to call upon the Defendant for his office copy; and, by the 14th of the New Orders of 1833, the Plaintiff was entitled to file his replication. The Defendant's motion was, in effect, an application for leave to file a supplemental answer, which must be supported by a special case.

Motion refused, but without costs.

(*a*) 1 *Russ. & Mylne*, 1.

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Dec. 6. 8. 14. The ATTORNEY-GENERAL *v.* The Corporation of POOLE.

Demurrer to an information, seeking relief against the corporation of *Poole*, and the person who had been town clerk before the passing of the Municipal Corporation Act, in respect of the compensation awarded by the council to such town clerk under the provisions of that act, allowed.

THIS was an information filed by the Attorney-General, at the relation of certain persons stating themselves to be rate payers of the borough of *Poole*, against the mayor, aldermen, and burgesses of the borough, and against *Robert Henning Parr*, and *Thomas Arnold;* and it prayed a declaration that the Defendant *Robert Henning Parr*, having voluntarily resigned his office of town clerk to the corporation of *Poole*, was not entitled under the municipal reform act (*a*) to any compensation in respect of such office; and that the town council had not, under the act, any authority to award him any compensation in respect thereof; but, in case it should appear, or the Court should be of opinion, that *Robert Henning Parr* did not voluntarily resign his said office, but was removed therefrom by the corporation, then that it might be declared, that, according to the true construction of the act, he was entitled to compensation in respect of his office of town clerk only, and not in respect of any other offices held by him, and that the town council had no right to award him any compensation in respect of any other office; and that it might be declared that the sum of 4500*l.* having been awarded to him in respect of his office of town clerk, and other offices was improper, illegal, contrary to the provisions of the act, and not binding on the rate payers; and that a bond executed to *Robert Henning Parr* might be declared to be fraudulent and void, and be delivered up to be cancelled, or else stand only as a security for any

(*a*) 5 & 6 *W.* 4. *c.* 76.

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any compensation to which he might appear to be entitled. The information further prayed that the rate made by the mayor, aldermen, and burgesses, on the 2d and 3d of *January* 1837 might be declared illegal, and that the same might be set aside or modified, and that *Robert Henning Parr*, or the mayor, aldermen, and burgesses, might be directed to refund to the rate payers the amount of the two instalments paid by them; and that *Parr* might be restrained by the injunction of the Court from demanding or receiving the said sum of 4500*l.* or from commencing or prosecuting any proceedings in respect of the bond, and that the mayor, aldermen, and burgesses might be restrained from enforcing the payment of the rate, and for other relief.

For the purpose of obtaining this relief, the information stated that, in the year 1833, *Robert Henning Parr* was elected or appointed by the then corporation town clerk of the borough of *Poole*, and that he was also appointed clerk of the peace of the county of the town of *Poole*, and held several other offices, the appointment to which did not belong to the corporation. That, after the municipal reform act came into operation, and on the first of *January* 1836, *Robert Henning Parr* resigned the office of town clerk and clerk of the peace, and was not re-elected or appointed to such offices, but that the Defendant *Thomas Arnold*, on the 1st of *January* 1836, was elected town clerk, and, on the 1st of *July* 1836, appointed clerk of the peace. That, on the 4th of *August* 1836, *Robert Henning Parr* sent in a claim for compensation under the act to the amount of 4835*l.* for the loss of his office of town clerk, the only office in respect of which he was entitled to compensation. That such claim included the profits derived from the office of clerk of the peace and other offices besides that of town clerk.

That

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That such claim was taken into consideration at a meeting of the town council on the 5th of *October* 1836, and that, at such meeting, one third of the town council then present objected to the claim being received, on the ground that *Robert Henning Parr* had voluntarily resigned the office of town clerk, as well as the office of clerk of the peace; and that the consideration of the claim was thereupon adjourned till the 14th of *October* 1836, and that on the last mentioned day the town council again met to consider the claim, which might then have readily been disposed of, but that adjournments of the said meeting to the 9th of *November* and subsequently to the 23d of *November*, were, without any reason being assigned for such adjournment, and without any necessity existing for the same, proposed and carried.

That, on the 10th of *October*, the list of burgesses was, pursuant to the act, revised by the mayor, *Robert Henning Parr* acting as one of the assessors to the mayor, and that on such occasion eighty persons, who had repeatedly before been excused their rates on the ground of poverty, were placed on the roll of burgesses, the rates due from them having been paid up.

That, on the 14th of *October*, a protest against the adjournment was signed by a third of the council, on the ground that sufficient progress had been made in the consideration of Mr. *Parr*'s claim to enable the council to determine thereon, but that, nevertheless, the adjournment took place, and on the 23d of *November* the council, as constituted after the new election, awarded a sum of 4500*l.* to Mr. *Parr* as the compensation to which he was entitled, and a bond under the seal of the corporation for that amount was given to him; that, on the 10th of *December*, a borough rate for 5000*l.* was ordered, but

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but that by another order, dated the 3d of *January* 1837, the rate was reduced to 2500*l.* The information charged that *Robert Henning Parr* had voluntarily resigned the office of town clerk, and was not removed from the same by any act of the town council; and that, not having been so removed, he was not entitled to any compensation in respect thereof; and that, if it should appear that he was removed and was entitled to any compensation, the same ought to have been computed with reference to the profits of the office of town clerk only, and to no other office held by *Robert Henning Parr*.

The information then proceeded to state that *Francis Turner*, an inhabitant of the borough, appealed against the rate made by the council to the recorder of the borough, who held that the notice of the appellant was defective, and refused to hear the appeal; that an application was subsequently made to the Court of King's Bench for a *mandamus* to the recorder to hear the appeal, and that a rule *nisi* was granted, which was subsequently discharged; that, such rule having been discharged, the rate-payers of the borough had no remedy at law against the rate, nor any means of appealing therefrom, not being able to try the validity of the rate by replevy, as the rate was also for other purposes besides the said compensation; and that the said compensation not having been, by reason of the fraudulent adjournment and alteration in the constitution of the town council, protested against by one third of the town council, no appeal lay to the Lords Commissioners of the Treasury according to the provisions of the act.

The information further charged that the mayor, aldermen, and burgesses had caused to be levied two instalments of the rate, and that they threatened and intended,

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intended, unless restrained by the injunction of the Court, to enforce the payment of the whole of the said compensation, and apply it in satisfaction of the sum secured by the bond; that such instalments were paid under protest, and ought to be returned to the persons who had paid the same.

To this information general demurrers were put in by the Defendants.

Sir *Charles Wetherell*, Mr. *Barber*, Mr. *Kindersley*, and Mr. *Puller*, in support of the demurrers.

The information is demurrable upon four grounds: first, for want of jurisdiction; secondly, for want of equity; thirdly, for multifariousness; and fourthly, for want of parties.

This Court is called upon to relieve against the compensation awarded by the town council to Mr. *Parr*, and to adjudicate upon the validity of the rate. With respect to the question of compensation, the Municipal Corporation Act has provided a particular forum which excludes the jurisdiction of this Court. By the sixty-sixth section (*a*) of that act, the council is to determine upon

(*a*) The sixty-sixth section is as follows: —

"And be it enacted, that every officer of any borough or county who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office under the provisions of this act, or who shall not be re-appointed as aforesaid, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and every person entitled to such compensation as aforesaid shall deliver

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upon the claim of every officer whose office should be abolished at the time of the passing of the act, or who should be removed from his office under the provisions of the act, or who should not be re-appointed; and if the claimant is dissatisfied with the determination of the council, or if one third of the members of the council sign a protest against the amount of the compensation allowed by the council, an appeal is given to the Lords of the Treasury. The law is well settled, that where a right is given for the first time by an act of parliament, and the act prescribes a particular mode of enforcing the

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deliver to the town clerk, or in case such person shall himself be town clerk, then to the treasurer of the borough, a statement under the hand of such person, setting forth the amount received by him or his predecessors in every year during the period of five years next before the passing of this act, on account of the salary, fees, emoluments, profits, and perquisites in respect whereof he shall claim such compensation, distinguishing the office, place, situation, employment, or appointment, in respect whereof the same shall have been received, and containing a declaration that the same is a true statement, according to the best of the knowledge, information, and belief of such person; and also setting forth the sum claimed by him as such compensation; and the town clerk or treasurer, as the case shall be, shall lay such statement before the council, who shall take the same into consideration, and determine thereon; and immediately upon such determination being made, the person preferring such claim, if he shall not himself be the town clerk, shall be informed thereof, by notice in writing, under the hand of the town clerk; and in case such claim shall be admitted in part and disallowed in part, such notice shall specify the particulars in which the same shall have been admitted and disallowed respectively; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon, or in case one third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive, it shall be lawful for the person preferring such claim, or any member of the council who shall subscribe such protest, to appeal to the Lords Commissioners of his Majesty's Treasury, who shall thereupon make such order as to them shall seem just."

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the right, the particular remedy is exclusive of all others; but where the right previously existed, and the statute is only affirmative of the right, and points out a further mode of enforcing it, the remedy is cumulative, and does not oust the prior jurisdiction. *Vin. Abr.* (*a*), *Co. Litt.* 348. b.; *Townsend's case* (*b*), *Griffith* v. *Apprice* (*c*); *The King* v. *Robinson* (*d*); *The King* v. *Burridge* (*e*). This principle has been undisputed from the time of *Elizabeth* down to the present period; and the greatest inconvenience might arise, if a different rule of construction were applied to the Municipal Corporation Act; for there might then be two simultaneous conflicting decisions on the same matter, one by the Lords of the Treasury, and another by this Court.

As to the validity of the rate, that is a legal question which this Court has no jurisdiction to determine. The act has provided a particular tribunal, the recorder's court; and in the particular case of appeal, which the recorder, for defect of notice, refused to entertain, the Court of King's Bench refused to grant a *mandamus* to compel him to hear the appeal. If the rate were bad upon the face of it, or if a distress had been levied for an illegal or excessive rate, the remedy by *certiorari*, or by replevin, was open to the rate-payers. *The King* v. *Wavell* (*g*), *Richter* v. *Hughes* (*h*), *Governors of Bristol v. Wait* (*i*). In the last session of parliament an act was passed by which the remedy by *certiorari* to the Court of Queen's Bench was expressly given to all persons interested in the borough fund, against any order of the council for payment of any sum of money out of the borough fund. (*k*)

Even

(*a*) vol. 19. p. 512.
(*b*) *Plowd.* 111.
(*c*) *Cro. Eliz.* 104.
(*d*) 2 *Burr.* 799.
(*e*) 3 *P. Wms.* 460.
(*g*) *Doug.* 116.
(*h*) 2 *B. & C.* 499.
(*i*) 1 *Ad. & Ell.* 264.
(*k*) 1 *Vict. c.* 78. *s.* 44.

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Even if the Court had jurisdiction, there is no equity to sustain this information. The information does not expressly allege that the council which determined the amount of compensation was illegally constituted, or that the adjournments were illegal. Whether the council was or was not legally constituted, and whether the adjournments were legal or otherwise, are questions which it does not belong to a court of equity to determine. If the proceedings were illegal, that is a legal objection; if they were legal, they are equally binding at law and in equity. There is no distinct allegation of fraud which can raise any equity to support this information. The adjournments are once parenthetically called "fraudulent;" but this transitory epithet cannot constitute an allegation, and, if it did, no fact is stated in the information which can support such an allegation. The allegations that *Parr* resigned his office voluntarily, and that the award of compensation is founded upon an allowance of claims in respect of other offices besides that of town clerk, raise no question for the equitable jurisdiction of this Court. If these objections are well founded, they are legal objections. Still less can that part of the information, which relates to the validity of the rate, furnish a ground for the equitable interposition of this Court. It has been determined that this Court has jurisdiction in cases of misapplication of the borough fund; but this information contains no allegation that there is a borough fund, or any corporation property over which the Court might have jurisdiction. There is, in fact, no corporate property which can give the Court such jurisdiction; but, on the contrary, the statements in the information are inconsistent with the existence of a surplus, constituting a corporate fund.

The third ground of demurrer is that the information is multifarious, a question as to the validity of the bond

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given to secure the amount of compensation awarded to Mr. *Parr* being mixed up with the totally distinct question as to the validity of the rate.

Lastly, this information purports to be an information filed on behalf of the rate-payers of *Poole*, and all the rate-payers are not before the Court. If such an information, therefore, could be sustained on other grounds, it would be defective for want of parties. But the Attorney-General has no right to file an information on behalf of the rate-payers as such: the case, made in the information is, that of the rate-payers only; no misapplication of the borough fund is alleged, and there is nothing in the nature of charity or public trust to support the proceeding instituted by the Attorney-General. *The Attorney-General* v. *Brown*. (*a*)

Mr. *Pemberton* and Mr. *Lynch*, *contrà*.

It is argued that the provision, made by the act for a particular tribunal, excludes the general jurisdiction of this Court; but that argument did not prevail in *The Attorney-General* v. *Aspinall* (*b*), where the Lord Chancellor, concurring, indeed, in that respect with this Court, held that the special remedies, provided by the act in cases of fraudulent alienation, did not oust the ordinary jurisdiction of this Court. The question here is, not whether we are entitled to all the relief which we ask, but whether we are entitled to any part of it; for, if we are entitled to any part of that relief, this demurrer cannot be sustained. The equity of the information is this, that the rate-payers and inhabitants, who are the *cestuis que trust* of the funds belonging to the corporation, allege that the corporation, who are the

(*a*) 1 *Swanst.* 265. (*b*) 2 *Mylne & Craig*, 613.

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the trustees, have, by collusion with the Defendant *Parr*, created an incumbrance upon those funds which ought not legally to constitute a charge upon them, and the relief which they seek is to be discharged from that incumbrance. That a public trust has been constituted by the Municipal Corporation Act has never been disputed. It was not disputed in the *Attorney-General* v. *Aspinall*, the question there being whether the trust attached on the corporation property from the time of the passing of the act, or not until the period appointed by the act for the appointment of a treasurer. If then a trust has been created for public purposes, is it not the practice of the Court to authorise an information by the Attorney-General to prevent any misapplication of the property on which a trust, whether of a charitable or other public nature, has attached? Such was the principle upon which the Court decided the case of the *Attorney-General* v. *Brown*, where an information was filed by the Attorney-General, at the relation of one of the inhabitants of *Brighton*, against the commissioners empowered by act of parliament to levy a rate on coals for certain public purposes. It is said that there is no property belonging to the corporation; and, if that is the case, there can certainly be no trust. But a corporation must, at least, have a common seal, and the insignia of office; there are, moreover, the proceeds of the fines and forfeitures transferred by the act from the Crown to the corporation, and the rates directed by the act to be carried to the borough fund for the purposes of the corporation. It is immaterial whether the corporate property consists of land or money belonging to the corporation previously to the passing of the act, or of monies directed to be levied under the provisions of the act, and, in that way, constituting a borough fund.

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If there is nothing in the act which expressly excludes the jurisdiction of a court of equity, it is settled by the cases of *The Attorney-General* v. *Aspinall* (*a*), and *The Attorney-General* v. *Wilson*, a case in which the corporation of *Leeds* were Defendants, and which was recently decided by the Vice-Chancellor on the authority of the *Attorney-General* v. *Aspinall*, that the ordinary jurisdiction of this Court is not ousted. The question, then, is whether this information does not allege a case of breach of trust against the corporation in collusion with *Parr*, which the Defendants are bound to answer. The intention of the legislature was to give to the new council the power of abolishing offices held under the old corporation; of removing persons from offices not abolished, and re-appointing the same persons or others as they might think fit; and of giving compensation to persons whose offices were abolished, or who might be removed and not re-appointed; but the council had no power, under the act, of giving compensation to a person who, as this information alleges, voluntarily resigned his office for the purpose of retaining other offices of a more lucrative description. Before the town clerk could be re-appointed, he must have been removed; but he could not be re-appointed without his own consent; and if, as we say, he abdicated his office, is there any pretence for saying that he was entitled to compensation? There is, at any rate, an equity to contend that the security given was not valid, and that any appropriation of the borough fund to the discharge of that security is a breach of trust. The appeal to the Treasury is only given on the supposition that the officer is entitled to some compensation, and one third of the council is dissatisfied with the award in respect of the *quantum* of compensation. Where, as in this case, there is

(*a*) 2 *Mylne & Craig*, 613.

is no right to compensation at all, the clause giving the appeal to the Treasury does not come into operation; but this Court becomes the only proper tribunal. Whether there was collusion or not between the corporation and Mr. *Parr*, a security was executed, as we allege, without authority on the one side to give, or on the other to receive.

If Mr. *Parr* was entitled to some compensation, is there not, upon the circumstances alleged in this information, an equity to have that compensation cut down in this Court to a just amount? Had Mr. *Parr*'s claim been delivered in shortly after his resignation, it might have been disposed of by the council then in existence. The matter was ripe for decision on the 14th of *October;* for what end were the adjournments made but for a fraudulent purpose? It is not alleged that the eighty new burgesses had no right to vote; but it is alleged that the adjournments were made until after the election of a new council, without necessity, and for the purposes of fraud. If compensation has been made, as the information alleges, in respect of the profits of all the offices held by Mr. *Parr*, it ought to be reduced in the proportion which the profits of the office of town clerk bear to the profits of that office together with the other offices included in Mr. *Parr*'s statement. The case has been argued as if the Court were asked to adjudicate upon the legality of the rate, instead of being called upon to prevent trustees from misapplying the trust funds. The application of rates, which are raised for the purpose of being administered by a corporation which is a trustee for public purposes, is a proper subject of equitable jurisdiction. There is no authority to shew that these rates can be relieved against at law, on the ground stated in the information. The cases cited, in which relief was obtained at law, are either cases in which

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which the rate was levied upon property not in the individual's possession at the time the rate was made, as in *The King* v. *Wavell*, or cases in which the commissioners had exceeded the amount of the rates which they were empowered to raise by the act, as in *Richter* v. *Hughes*. All that a court of law can look to, on an appeal, or action brought against a rate, is its legality; it cannot, in such a proceeding, correct its misapplication, still less can it look to the purposes to which it is intended to be misapplied. *The King* v. *The Mayor of Gloucester* (*a*). That is the province of a court of equity, and against such misapplication relief is properly sought in this Court.

Multifariousness is an objection which is frequently taken, and which rarely prevails. If in the same record matters are involved which have no connection with each other, or in which some of the defendants have no interest, the suit is multifarious. The object of this information is to set aside a bond given by one party in breach of their trust, and accepted by another in breach of his duty. The corporation and the Defendant *Parr* have a direct interest in the suit, and the Defendant *Arnold* is made a party for the purpose of discovery. Where, in this case, are the two demands which are inconsistent with each other, or how can this suit be impeached as multifarious? The information may pray more relief than the Court may ultimately grant, but excess in the quantity of relief prayed does not constitute multifariousness.

Neither can this demurrer be sustained for want of parties. When the Attorney-General files an information on behalf of a charity, it is not necessary to make all

(*a*) 5 *T. R.* 346.

all the objects of the charity parties; nor is it necessary, when the subject of the information is a public trust, to make all the *cestuis que trust* parties. *The Attorney-General* v. *Brown* (*a*), where the information was filed by the Attorney-General, and a single inhabitant representing the rest, is a direct authority in support of the form of this information. In that case a similar objection, for want of parties, was urged without success; and in *The Attorney-General* v. *The Corporation of Dublin* (*b*) Lord *Eldon* expresses his adherence to the opinion which he given had upon this point in *The Attorney-General* v. *Brown*.

Sir *Charles Wetherell*, in reply.

The jurisdiction of this Court is taken away, if not by the express words of the act, by necessary implication. There is a most material distinction in this respect between the language of the ninety-second section, which gives authority to the privy council in cases of fraudulent or improvident alienation; and the language of the sixty-sixth section, which gives an appeal from the determination of the council to the Lords of the Treasury. In the one case the clause gives a discretionary authority; the privy council are to act if they think fit; in the the other, the clause is mandatory, and the Lords of the Treasury are to make an order which shall be binding upon all parties. This difference entirely distinguishes the present case, so far as the question of jurisdiction is concerned, from *The Attorney-General* v. *Aspinall*, and *The Attorney-General* v. *Wilson*.

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(*a*) 1 *Swanst.* 265. (*b*) 1 *Bligh, N. S.*, 312.

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The Master *of the* Rolls.

The Municipal Reform Act effected great changes in the situation and duties of the corporate officers. It gave authority to the borough council to appoint a town clerk, treasurer, and such other officers as should be necessary, and to discontinue the appointment of such officers as should not be thought necessary, and to remove all ministerial or executive officers; and the officers were directed to act until removal, and no longer, unless re-appointed under the provisions of the act; and the sixty-sixth section enacts, that every officer who shall be in an office of profit at the passing of the act, whose office shall be abolished, or who shall be removed from his office under the provisions of the act, or who shall not be re-appointed as aforesaid, shall be entitled to have an adequate compensation, to be allowed by the council, and paid out of the borough fund.

This is not the case of an officer whose office has been abolished, or of an officer who has been removed from his office by an act of the council under the provisions of the act; but it is the case of an officer who has not been re-appointed under the provisions of the act. The information, which alleges that Mr. *Parr* resigned, does not allege that, if he had not resigned, he would have been re-appointed; but insists that, because he resigned, he had no title to any compensation. The act, however, makes no exception as to officers who are not re-appointed in consequence of resignation on their part; and it is, I think, equally consistent with the general scope and purpose of the act, and with the plain construction of the words employed in reference to this subject, that any officer, who, in consequence of the great and important alterations made in the nature and tenour of his office, thought fit to resign, and thereby

thereby to forego the chance of re-appointment, should nevertheless be entitled to compensation. I am, therefore, of opinion that, on this information, there is nothing to shew that Mr. *Parr* was not entitled to some compensation.

But, in cases in which the officers are entitled to compensation, the act appoints the mode of proceeding, and provides for a complete and satisfactory investigation of the merits of the claim. It is enacted that compensation shall be allowed by the council; that the council shall consider the claim; that the claimant, on the requisition of any member of the council, shall attend any meeting of the council, and answer, on oath or affirmation, all such questions as any member of the council may ask, and that the council shall determine on the claim.

The council having determined on the claim, an appeal is given to the Treasury. The claimant may appeal, if he thinks himself aggrieved; and if one third of the members of the council shall think the compensation excessive, and shall subscribe a protest against it as such, any member of the council, who shall have subscribed the protest, may appeal; and the order of the Treasury on the appeal is declared to be binding on all parties.

The act is silent as to any remedy against excessive compensation, if so many as one third of the council do not protest against the amount, or, in other words, if more than two thirds of the council approve the amount; and by this enactment it would seem to have been intended to protect the officers, and not to permit the compensation awarded to them by the majority to be

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be disturbed as excessive, if it was not protested against by one third.

The act is the law by which the borough fund is formed; by which the corporate property and the borough fund are impressed with a trust, by which the right of the town clerk to compensation is enacted, and by which the remedy for any defect or excess in the compensation is given. These circumstances also tend to shew that the remedy was intended to be exclusive; and, if it be not exclusive, it might happen that, in respect of the same order for compensation, the town clerk might complain of it by way of appeal to the Treasury as defective; and the Attorney-General by information, with or without any rate-payer for his relator; or, according to another view of this case, any rate-payer by bill might complain to this Court of the same compensation as excessive. There might be an order of the Treasury, which is declared by the act to be binding on all parties, and another and inconsistent order of this Court pronounced in the exercise of its jurisdiction on breaches of trust; and, in cases in which an appeal to the Treasury does not lie, this Court, in support of its jurisdiction, might find it necessary to pursue a mode of ascertaining the compensation different from that which is appointed by the act, namely, an assessment by the council.

Supposing, however, that the establishment of a trust may, in this case, as in other cases, carry with it a right to resort to this Court for relief in case of any breach of the trust; and conceiving that this Court would interfere in cases of fraud or misconduct amounting to a gross breach of trust, which the appointed tribunal could not reach, it is necessary to consider the allegations

gations of this information for the purpose of ascertaining whether they afford a ground for equitable relief.

The allegations to be considered are, first, that the compensation is excessive and improper, because founded on a computation which brings into account the profits of other offices besides that of town clerk; and, secondly, that a protest of one third of the council was prevented by fraudulent adjournments and alteration in the constitution of the town council.

As to the first of these allegations, it is evident that, if an office be of such a nature, or so circumstanced, that the holder by having it acquires, or by quitting it loses, the possession of other offices, the loss of the office induces not only the loss of the profits of the office itself, but also the loss of the profits of the other offices which were in a sense dependent upon it; and that a just compensation for the loss of the office must, to some extent, take into account the value of those other offices.

The statute says that, in assessing the compensation for the salary, fees, and emoluments of the office, regard is to be had to the manner of appointment to the office, to the officer's term or interest therein, and all other circumstances of the case; and the loss of dependent offices, consequent on the loss of the office, to which the officer is not re-appointed, appears to me to be a very important circumstance of the case to be considered; and I do not think that the compensation is to be considered as excessive, merely because the profits of other offices were taken into consideration.

With respect to the alleged fraudulent adjournments, and alteration in the constitution of the town council, it does

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does not appear to me that the information contains any statement of facts which can be relied on as forming a foundation for the charge of fraud. If there was no fraudulent or corrupt practice successfully employed in procuring the election of the new town councillors on the 1st of *November*, the town council of *November* represented the borough as fairly as the town council of *October*; and the statement shews nothing like a fraudulent practice successfully employed in procuring the election of the new councillors. It is stated that Mr. *Parr* acted as one of the assessors of the mayor, when the burgess list was revised on the 14th of *October*; that eighty persons, who had formerly been excused, had their rates paid up, and voted in the election: but it is not stated that Mr. *Parr* practised any fraud in his character of assessor; or that the eighty persons mentioned were fraudulently placed on the burgess roll to influence, or that they did influence, the election; or that the councillors elected were any other than fair representatives of the voters; or that for such, or any other reasons, the town council of *November* was not competent to act for all borough purposes, to award a just compensation, and protect the borough against an excessive claim. And, under these circumstances, I think that the facts stated do not support the vague and general allegations of fraud, which this information contains.

I think it unnecessary to notice particularly the other parts of this information. The relief sought is mainly founded on the allegation that Mr. *Parr* resigned, and was not removed from his office. The alternate relief sought is founded on the hypothesis that Mr. *Parr* may have been removed without having resigned; and it is with a view to that contingency, that the information prays that the compensation awarded may be reduced.

The

The allegations respecting the illegality of the rates which have been ordered, and the relief thereupon sought, have reference either to the case in which Mr. *Parr* might be entitled to no compensation at all, or to the case in which the compensation awarded to him ought to be reduced, but must depend, and be consequent on, one of those branches of relief. And as it does not appear to me, that, upon this information as framed, it can be declared that the bond ought either to be delivered up to be cancelled, or ordered to stand as a security for some less sum than it purports to secure, I do not consider it necessary to express any opinion on the arguments relating to the validity of the rate, or the jurisdiction of this Court to interfere on the subject.

I allow these demurrers, on the ground that no case is made for the interference of a court of equity.

Mr. *Pemberton* and Mr. *Lynch*, on the next seal-day, moved for leave to amend the information, on the ground that the demurrer had been allowed rather in consequence of the defect in the charging part of the information, than upon any substantial want of equity; but his Lordship, without hearing the other side, refused the motion.

1838.

1838.
March 2.

SENIOR *v.* WILKS.

Where the decree was made by the Vice-Chancellor, and an order upon a petition in the cause was afterwards made by the Master of the Rolls reserving the costs of the petitioners, the reservation of costs does not give authority to the Master of the Rolls to hear a petition in the cause, presented after the 20th of *May* 1837; but such petition must, under the new orders, be heard by the Vice-Chancellor.

THIS was a suit for the administration of a testator's estate, in which the usual decree for taking the accounts had been made by the Vice-Chancellor. Two of the creditors, *John Lloyd* and *Henry Lloyd*, who came in under the decree to prove their debts, and whose claim had been disallowed by the Master, had, upon a petition presented to the Master of the Rolls before the promulgation of the new orders, dated the 5th of *May* 1837, obtained an order for a reference to the Master to reconsider their claim, and the costs of the petitioners were reserved by that order. The Master afterwards allowed their claim, and made a separate report of debts due from the testator's estate, including the debt of the petitioners. A petition was now presented by the Plaintiffs, the object of which was to have a dividend of 13*s.* in the pound on the debts, found due, paid out of the assets then realised.

Mr. *Pemberton*, for the petitioners, submitted whether, under these circumstances, the Court, which had reserved to itself the power of adjudicating upon the costs of the former petition, had not authority to dispose of the present petition.

Mr. *Wilbraham*, *contrà*, said that, the decree having been made by the Vice-Chancellor, the petition must, in conformity with the new orders (*a*), be heard by the same judge.

The MASTER *of the* ROLLS said, the distribution of this estate must now be considered as under the jurisdiction of the Vice-Chancellor.

(*a*) 1 *Keen*, xiv.

1838.

BREWIN *v.* AUSTIN.

March 1.

Rule as to the computation of subsequent interest, where the amount of the principal, interest, and costs, due upon a mortgage, has been found by the Master's report.

BY the decree made in the cause, the testator's estates were directed to be sold free from the incumbrances of such mortgagees and incumbrancers as should consent to the sale. All the mortgagees consented; and the Master, by his report, found the amount of the principal, interest, and costs due upon the mortgage of the petitioner *Joseph Kearsley*. The estates were sold, the purchase-money had been paid into court, and the petition now presented prayed for a reference back to the Master to compute subsequent interest upon the petitioner's mortgage, and to compute and tax his subsequent costs, and for payment of the sum found due by the report and of such subsequent interest and costs.

Mr. *Koe*, who appeared for the petitioner, mentioned the case of *Bruere* v. *Wharton* (*a*), where a note of *Robinson* v. *Pennyman* in the Exchequer was cited from Lord *Colchester*'s manuscripts, in which it was said, that "after the report of principal, interest, and costs on a mortgage, and time enlarged, with order to compute subsequent interest, this subsequent interest was to be computed on the aggregate reported sum of principal, interest, and costs, and not on the principal only; and agreed the practice in Chancery to be the same;" and the Vice-Chancellor said he had always understood the practice to be as stated in that note, and made an order accordingly. In *Whatton* v. *Cradock* (*b*), however, the point was raised in this Court, and his Lordship held the rule to be that, where the amount of principal and interest due upon a mortgage had been found by the Master's report, and it was referred back to the Master to compute

(*a*) 7 *Sim.* 483. (*b*) 1 *Keen*, 267.

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pute subsequent interest, such subsequent interest was to be computed upon the principal only. *Bruere* v. *Wharton* had appeared very recently, but, in point of date, was considerably prior to the decision in *Whatton* v. *Cradock*.

The MASTER *of the* ROLLS.

On bills of foreclosure, when the mortgagor asked to enlarge the time appointed for payment, and the Court thought proper to grant the application, the practice formerly was not to order any immediate payment, but to order subsequent interest to be computed on the aggregate amount of principal, interest, and costs already reported. For many years past, however, the practice has been to enlarge the time only on the terms of first paying the interest and costs already reported; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid. *Monkhouse* v. *The Corporation of Bedford* (*a*), and *Edwards* v. *Cunliffe* (*b*), do not appear to have been referred to in the case cited. If, for any special reason, the Court should think fit to enlarge the time without ordering any immediate payment, I conceive that it would now be proper to order the subsequent interest to be computed on the aggregate amount of principal, interest, and costs before computed.

The present case, however, does not arise on a bill of foreclosure; it is not the case of a mortgagor asking for delay, but of a mortgagee asking for payment in an administration suit in which the mortgaged estate has been sold; and, after the inquiries which I made as to the practice in such cases, when *Whatton* v. *Cradock* was under my consideration, I think that the direction there given was right, and that, in this case, the direction must be to compute subsequent interest on the principal only.

(*a*) 17 *Ves.* 380. (*b*) 1 *Mad.* 287.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

1836.

KNOTT *v.* MORGAN.

1836.
July 27.
Aug. 10.

Injunction granted to restrain the Defendant from running an omnibus having upon it such names, words, and devices as to form a colourable imitation of the words, names, and devices on the omnibuses of the Plaintiffs.

AN *ex parte* injunction was obtained on the 27th of *July*, restraining the Defendant, *Robert Morgan*, his agents and servants, from running, or in any manner using or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, with the names "London Conveyance" and "Original Conveyance for Company," or either of such names painted, stamped, printed, or written thereon, or in any manner affixed thereto; and also from running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus, carriage, or vehicle having the names "Conveyance Company," and "London Conveyance Company," or either of such names, or any colourable imitation of such names, or either of them painted, stamped, printed, or written thereon, or in any manner affixed thereto.

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The bill was filed by four of the proprietors of the London Conveyance Company, on behalf of themselves and the other proprietors; and it stated that the company was established under a deed, which was set forth in the bill, for the purpose of running omnibuses between *Paddington* and the Bank; that their omnibuses were of a novel and superior construction; and that the Defendant, with the view and design of fraudulently procuring the custom of persons who were in the habit of using the omnibuses of the Plaintiffs, began to run between *Paddington* and the Bank an omnibus, on which were painted the words, "Conveyance Company" and "London Conveyance Company," in such characters and parts of the omnibus as exactly to resemble the same words on the omnibuses of the Plaintiffs; that a star and garter were, in like manner, painted on the omnibus of the Defendant, so as exactly to resemble the same symbol on the omnibuses of the Plaintiffs; and that the green livery and gold hat-bands, by which the Plaintiffs distinguished the coachmen and conductors of their omnibuses, were in like manner imitated by the Defendant. The bill further stated, that the Plaintiffs served a notice upon the Defendant, intimating that an injunction would be applied for, if the Defendant continued to use the title and insignia by which the omnibuses of the Plaintiffs were distinguished; and that, after such notice, the Defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company" the word "for" in very small and invisible characters, so that there were then painted on the back of the Defendant's omnibus, the words "London Conveyance," and on each side, the words "Original Conveyance for Company." The bill stated that the coachmen and conductors

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conductors employed by the Defendant continued to wear the same livery; and it charged that such colourable imitation of the name and title of the London Conveyance Company was a fraud upon the Plaintiffs and the public; and it prayed an injunction.

A motion was now made to dissolve the injunction.

Aug. 10.

Mr. *Kindersley* and Mr. *Bird*, in support of the motion.

The first ground, upon which we contend that the order for this injunction cannot be sustained, is, that the Plaintiffs have not complied with the requisitions of the acts of parliament, passed for regulating hackney and stage carriages, and are, therefore, not entitled to sue. By the eleventh section of the 1 & 2 *W.* 4. *c.* 22., which is an act to amend the laws relating to hackney carriages, and to place the collection of duties on hackney carriages under the commissioners of stamps, it is provided that a requisition for a licence shall be made by the proprietor, or one of the proprietors of the hackney carriage in respect of which the licence shall be applied for, and that in such requisition there shall be specified the christian name and surname, and place of abode, of every person who shall be a proprietor; and the twelfth section enacts that in every licence granted there shall be the like specification. The ninth and eleventh sections of the 2 & 3 *W.* 4. *c.* 120. contain exactly the same provisions in respect to stage carriages. It is admitted, upon the bill, that there are 100 proprietors, and it is not alleged that the provisions of the act have been complied with. The four Plaintiffs are, in point of fact, the only proprietors whose names are specified in their licence. This is a fatal objection to the suit, upon the principle that the Court will not give relief to a

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party who has not complied with the requisitions of an act of parliament, which are in the nature of a condition precedent to his assuming the character in which he sues. Thus, in *Harmer* v. *Westmacott* (*a*), the Court refused to relieve the assignees of a party against a fraudulent transfer of his interest in a newspaper, on the ground that that party had himself infringed the provisions of the act, which requires the true names of the proprietors of a newspaper to be delivered to the commissioners of stamps. The same principle is recognised in cases which have been determined at law. *Bensley* v. *Bignold* (*b*), *Marchant* v. *Evans* (*c*), *Stephens* v. *Robinson.* (*d*)

If this objection be good, it is immaterial whether the Defendant has, as is alleged, fraudulently endeavoured, by a colourable imitation of the title and insignia of the Plaintiffs, to deprive them of their legitimate profits. But there is no ground for that allegation. The Plaintiffs have no right to appropriate to themselves the title of "London Conveyance Company;" still less can they claim a monopoly in the use of the words "Conveyance Company," which is a distinct title from that which they assume in the deed. In the bill they say their profits have been diminished by the conduct of the Defendant; but in their affidavit they only swear that their profits have been "affected," and their profits may, in fact, have been increased by the competition. The Court will not favour applications in restraint of trade, the effect of granting which would be to deprive the public of the benefit arising from competition. In *Blanehard* v. *Hill* (*e*), Lord *Hardwicke* said he did not know any instance of granting an injunction to restrain one trader from

(*a*) 6 *Sim.* 284.
(*b*) 8 *Taunt.* 142.
(*c*) 5 *B. & Ald.* 335.
(*d*) 2 *Cr. & Jer.* 209.
(*e*) 2 *Atk.* 284.

from using the same mark with another, and he thought it would be of mischievous consequence to do it. And in *Smith* v. *Fromont* (*a*), Lord *Eldon*, after mentioning the only instance which he recollected of an application to the Court to restrain the driving of coaches, said he had some doubt whether he was not degrading the dignity of the Court by interfering.

Mr. *Pemberton* and Mr. *Turner*, *contrà*.

The eleventh section of the act, relating to stage carriages, which is alone applicable to the present case, and which is relied upon on the other side, requires the particulars therein enumerated to be specified in the licence, or "such of them as the commissioners shall think fit;" so that the commissioners have a discretion to dispense with the specification of the names of all the proprietors; and, in this instance, they have exercised that discretion by granting a licence in which the names of four of the proprietors only are specified. But, even if the commissioners had no such discretion, there is no ground for the objection, and the case of *Harmer* v. *Westmacott* has no application. The distinction is this — that, where an act contains a provision which relates merely to the regulation of the revenue, and imposes a penalty for the breach of it, such provision creates no disability, and has no operation beyond the liability to pay the penalty if the regulation is infringed. But where the act contains a regulation, which has for its object the protection of the public, and the infringement of which is against the policy of the law, the non-compliance with that regulation will disqualify a party from suing in a character which he has not, in point of law, acquired. The provision in the act of parliament, requiring

(*a*) 2 *Swanst.* 332.

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requiring the insertion of the true names of the proprietors of a newspaper in the affidavit delivered to the commissioners of stamps, is a provision made for the protection of the public, and it was on account of the violation of that provision that relief was refused in *Harmer* v. *Westmacott*. "No relief," said the Vice-Chancellor, "in that case, can be given, in a court of justice, to those who shew that they thought proper to disappoint the policy of the law, and to do that which the policy of the law requires should not be done." In this case the specification of the names of all the proprietors is a mere fiscal regulation, for the non-compliance with which a penalty is imposed; and the act, moreover, contains an express provision that no person shall sue for the penalty except under the authority of the commissioners. The copyright act (*a*) requires an entry of the work, previous to publication, at *Stationers' Hall*; yet it has been held that the neglect to enter the work at *Stationers' Hall* does not disable an author, whose book has been pirated, from maintaining an action for damages: *Beckford* v. *Hood*. (*b*)

As to the merits, it is scarcely attempted to be denied that the Defendant has pirated the title, liveries, and decorations of the Plaintiffs; and the variation which the Defendant made in some of these particulars, after the notice with which he was served, strengthens instead of altering the case of fraud which is made by the Plaintiffs. The law has been settled, from the year-books downwards, that a man has no right to trade under false colours, and to sell his goods as another's.

Mr. *Kindersley*, in reply.

The

(*a*) 8 *Ann. c.* 19. (*b*) 7 *T. R.* 620.

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The first question is, whether the Plaintiffs are entitled to sue; and I think that, in the absence of any evidence to the contrary, I must presume that the commissioners of stamps, in whom the act of parliament has vested the power of licensing the proprietors of stage carriages, have granted to the Plaintiffs a proper licence, and that the Plaintiffs have, consequently, a right to sue.

The only other question is, whether the Defendant fraudulently imitated the title and insignia used by the Plaintiffs for the purpose of injuring them in their trade; and, upon the affidavits and evidence before me, I have not the least doubt that the Defendant did intend to induce the public to believe that the omnibus which he painted and appointed, so as to resemble the carriages of the Plaintiffs, was, in fact, an omnibus belonging to the Plaintiffs and the other proprietors of the London Conveyance Company. It is not to be said that the Plaintiffs have any exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words; but they have a right to call upon this Court to restrain the Defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the Defendant's, belong to, and are under the management of, the Plaintiffs. I am not satisfied that the injunction has been drawn up exactly in the words in which it ought to have been framed. Let the order, dated the 27th day of *July* last, be varied, therefore, so that the injunction may be awarded to restrain the Defendant, *Robert Morgan*, his servants and agents, from running, or in

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any manner using or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, or any other omnibus, having painted, stamped, printed, or written thereon the words or names "London Conveyance," or "Original Conveyance for Company," or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or be a colourable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the Plaintiffs; and let the Defendant pay to the Plaintiffs their costs of this application.

An appeal motion to discharge this order was heard at the Lord Chancellor's house on the 18th and 19th of *August*, and dismissed by his Lordship with costs. The objection to the suit, on the ground of the non-compliance of the Plaintiffs with the directions contained in the ninth and eleventh sections of the 2 & 3 *W.* 4. *c.* 120. was again urged, on the part of the Appellant, by Sir *Charles Wetherell*, Mr. *Kindersley*, and Mr. *Bird;* but the Lord Chancellor was of opinion that those directions were merely fiscal, and did not affect the Plaintiff's right to sue.

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BERRY *v.* ARMISTEAD.

April 20. 22.
July 5.

A purchaser and his solicitor fraudulently, and in the absence of the purchaser's solicitor, obtained from a purchaser (who was desirous of completing the purchase, and had entered into possession) the purchase-money and covenants for the production of title deeds, while the title as to a part of the purchased premises was still under investigation.

On a bill filed by the purchaser against the vendor and his solicitor, it was held, that the Plaintiff was entitled to have the contract rescinded, and his purchase-money, together with all costs, charges, and expenses (including auction duty), repaid to him, and to have the deeds of covenant executed by him delivered up to be cancelled.

THE bill was filed by *Richard Starling Berry*, the purchaser of part of an estate which had been sold by auction, against *Arthur Armistead*, the vendor, and *Richard Willis*, his solicitor; and it prayed a declaration that the Plaintiff had been induced to complete his purchase by the false and fraudulent misrepresentations of the Defendants, and that the agreements for the purchase might be rescinded, and delivered up to be cancelled; that the purchase-money, together with all the costs, charges, and expenses incident to the purchase, might be repaid to the Plaintiff; and that the deeds of covenant, fraudulently procured to be executed by the Plaintiff, might be delivered up; or for a reference to the Master, to ascertain to what part of the premises a good title could be made, and for a compensation as to the rest; and that the Defendants *Armistead* and *Willis* might pay the costs of the suit.

The Defendants, by their answer, insisted that the Plaintiff had accepted the title; had been let into possession of the estates in question; and had executed the deeds of covenant, and paid the purchase-money, with a full knowledge of all the circumstances of the transaction which the Plaintiff sought to impeach.

The case made by the bill was, that the Defendant *Armistead*, claiming to be seised in fee simple of certain estates devised to him by the will of *James Bibly*, dated the

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the 30th of *January* 1822, upon trust for sale, put up the same for sale by auction, on the 20th of *September* 1832, in many lots; and that, at such auction, the Plaintiff became the purchaser of ten lots, at sums amounting in the whole to 2170*l.*; and that he subsequently became the purchaser of another part of the same estate for the sum of 735*l.* The sum of 217*l.* was paid by the Plaintiff in part payment of the purchase-money.

On the 12th of *January* 1833, abstracts were delivered by the Defendant *Willis*, the solicitor of the vendor, to *Thomas Wilson*, the solicitor of the Plaintiff; and, in the same month, the Plaintiff took possession. On the 31st of the same month of *January* the abstracts were returned, with several marginal queries, one of which, opposite to the recital of a fine levied by the testator, after the date of his will, was as follows: "Query as to the operation of this fine upon the will: copy of chirograph to be furnished to ascertain this." The abstracts were returned by the solicitor of the vendor to the solicitor of the purchaser on the 13th of *February* 1833, with answers to the several queries; and under the last-mentioned query were written the words and initials, "will be, *R. W.*" Both parties were desirous that the contract should be carried into effect; the operation of the fine was not considered as a matter of much importance by the purchaser's solicitor, who was of opinion that the fine operated only as a revocation of the will *pro tanto;* he accordingly prepared a draft conveyance, which was approved by the solicitor of the vendor, and afterwards engrossed. It was understood, however, between the solicitor of the vendor and the solicitor of the purchaser, that the question as to the fine was still to be considered as open to discussion.

On

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On the 27th of the same month of *February*, the Plaintiff happened to meet Mr. *Bradley*, a conveyancer, and personal friend of the Plaintiff; and, the question as to the fine having been mentioned, Mr. *Bradley* informed the Plaintiff that he had examined the same title for Mr. *Clark*, who had purchased some other part of the property, and that he had given an opinion that the effect of the fine was to operate a complete revocation of the will, and that the vendor had consequently no title. On the same day the Plaintiff wrote a letter to his solicitor, communicating this information; and, on the 28th of *February*, the Plaintiff's solicitor read this letter to the Defendant *Willis;* and the bill alleged that it was at this time distinctly understood, between the solicitor of the purchaser and the solicitor of the vendor, that no further step should be taken until the chirograph of the fine, and the other information, required on the abstracts, should be furnished, and the abstracts of title laid before Mr. *Bradley* for his opinion.

On the 2d of *March* 1833, the Defendants *Armistead* and *Willis* went to the office of Mr. *Thomas Wilson*, the Plaintiff's solicitor, who was at that time confined to his bed by indisposition, and had an interview with Mr. *John Wilson*, a partner of Mr. *Thomas Wilson*, who knew nothing of any difficulties as to the title. The Defendant *Willis* asked Mr. *John Wilson* for the engrossment of the conveyance, representing that he was able to comply with every thing required on the part of the purchaser, and that it was desirable to get the conveyance executed by all parties. Mr. *John Wilson* delivered the engrossment of the conveyance to the Defendant *Willis*. On the following day Mr. *Thomas Wilson* was informed of this by his partner; and on the next day, the 4th of *March*, he went to the office of *Willis*, and stated to him that it was

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was unfair to have obtained the engrossment in his (Mr. *Wilson*'s) absence, and that he (Mr. *Wilson*) would immediately go over to *Slyne House*, the residence of Mr. *Bradley*, and lay the abstracts before him for his opinion. On this occasion the Defendant *Willis* expressed a desire to obtain the signature of Mr. *Berry* to two deeds of covenant for the production of deeds relating to the purchased property; and, according to the evidence of Mr. *Wilson*, he asked Mr. *Wilson* to write a letter advising the Plaintiff to execute this deed, which Mr. *Wilson* refused to do. A different account of what took place at the meeting on the 4th of *March* was given in the answer of the Defendant *Willis*, who stated that it was arranged and understood at that meeting, that the Defendant *Willis* should take the deeds of covenant to *Bolton*, where Mr. *Berry* resided; and that Mr. *Wilson*, after laying the abstracts before Mr. *Bradley* at *Slyne House*, which was on the road to *Bolton*, should proceed to the Plaintiff's house at *Bolton*, to meet the Defendant *Willis*. Mr. *Wilson*, in fact, went to *Slyne House* to consult Mr. *Bradley* as to the effect of the fine; and on the same day, the 4th of *March*, the Defendants *Armistead* and *Willis* went to the Plaintiff Mr. *Berry*, and induced him to pay the remainder of the purchase-money, and to execute two deeds of covenant for the production of the title deeds of the estate, which were not in his possession, on receiving the following memorandum: — "I do hereby acknowledge to have received from Mr. *Berry* 2688*l*., the remainder of the purchase-money, and which I undertake to be accountable for, and return to Mr. *Berry*, in case the title to the premises shall not be complete. As witness my hand, this 4th day of *March* 1833. *Richard Armistead.* Witness, *Richard Willis*." The Defendant *Willis*, on his return from *Bolton*, delivered the deeds of covenant to the other purchasers, and paid part

part of the purchase-money to the mortgagee of the estate. On the evening of the same 4th of *March*, he went to the office of Mr. *Wilson*, and stated to him what had taken place, when Mr. *Wilson* said that this should not have happened, if he (Mr. *Wilson*) had been present.

On the 25th of *March* 1833 Mr. *Bradley* returned the abstracts with an opinion that the fine operated as a complete revocation of the will, and that the vendor had no title. The fine applied only to a part of the purchased premises. The bill was filed in the month of *August* 1833.

Mr. *Swanston*, Mr. *Kindersley*, and Mr. *Walker*, argued that the fine, being levied for the purpose of securing a mortgage debt, was only a revocation of the will *pro tanto*, and they cited *Rider* v. *Wager* (*a*), *Selwyn* v. *Selwyn* (*b*), and *Doe* v. *Whitehead*. (*c*)

Mr. *Pemberton* and Mr. *Sharpe*, *contrà*.

The MASTER *of the* ROLLS intimated that the case turned mainly upon the alleged fraud and misrepresentation; and that, if these should be established, the validity of the title was, in his view of the case, immaterial.

The evidence on the part of the Plaintiff was in many particulars, but not in substance, contradicted by the evidence for the Defendants; and there were many inconsistencies between the answers of the Defendants and the evidence produced on their behalf.

The

(*a*) 2 *P. Wms.* 328.
(*b*) 2 *Burr.* 1131.
(*c*) 2 *Burr.* 704.

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The MASTER *of the* ROLLS (after stating and commenting upon the facts of the case): —

I am of opinion that a case of fraud has been established against the Defendants, and that the Plaintiff is entitled to the relief which he prays without reference to any question whether the objections to the title can or cannot be sustained, or to what part of the premises which the Plaintiff contracted to purchase these objections may apply. This is the case of a solicitor for the vendor, who goes to the purchaser in the absence of the purchaser's solicitor, or any person to advise him, and induces him to pay his purchase-money for an estate to which the title was not made out, and to execute deeds of covenant for the production of deeds which were not in his possession. Having done this, he goes back to *Lancaster;* he does not conceal what he has done, but informs *Wilson*, the purchaser's solicitor, of what had taken place, upon which *Wilson* said, "This should not have happened, if I had been there." Being thus fully aware of the disapprobation of the purchaser's solicitor, he ought immediately to have returned the purchase-money, and the deeds of covenant which he had so improperly obtained. Instead of doing that, he delivered over the deeds of covenant to the other purchasers, and paid the money to the mortgagee; and he now insists that the title has been accepted by the purchaser. Never was conduct more justly characterised as improper and fraudulent; and I have no hesitation in saying that, so far as the Court has power to do it, the parties must be placed in the situation in which they stood previously to this transaction.

The bill prays that the contract originally entered into may be rescinded, and delivered up to be cancelled. I should have had considerable hesitation on this point, if

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if *Willis* had done that which he ought to have done, when the purchaser's solicitor protested against his conduct; namely, if he had returned the money, and placed the deeds in the hands of Mr. *Wilson*. In that case, however improper the conduct of the Defendants, there might have been a possibility of giving to *Armistead* the benefit of his contract. Instead of taking that course, he insisted that the title had been accepted, and this suit was commenced. When the bill was filed, *Armistead* did not acknowledge his error, nor express any willingness to place the Plaintiff in his former situation; but, on the contrary, he has gone into evidence for the purpose of proving that which he must have known not to be the fact. The bill was filed so long ago as *August* 1833; and the question is whether, under all these circumstances, the vendor would be entitled to call upon the purchaser for the specific performance of the contract, supposing his right to enforce it to have been unimpeachable at the time the contract was entered into.

I am of opinion that the vendor would not, under the circumstances, be entitled to the assistance of a court of equity. And I must declare that the Plaintiff was induced to complete his purchase by false and fraudulent misrepresentations; and decree that the agreements be rescinded, and delivered up to be cancelled; and the Defendants must pay the costs of investigating the title, and the costs of the suit.

July 5.

Mr. *Pemberton*, on a subsequent day, when the minutes of the decree were spoken to, asked that there might be inserted in the decree an order for the payment by the Defendants of the auction duty, which was included in the prayer for payment of all costs, charges, and expenses

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penses incident to the purchase; and he cited *Cane* v. *Baldwin* (*a*), where Lord *Ellenborough* held that a vendor, who failed to make a title to the purchaser, was bound to repay the deposit and auction duty which had been paid by the vendee.

Mr. *Kindersley*, *contrà*, submitted that the auction duty was not included in the terms of the prayer; and that, if it was, the insertion of an order for payment of it was unnecessary.

The MASTER *of the* ROLLS thought the auction duty was comprehended in the prayer, and that a direction for the payment of it should be inserted in the decree, that the point might not be left open to further discussion.

The decree was as follows: —

Declare that the Plaintiff *Richard Starling Berry* was induced to complete his purchase of the hereditaments and premises in the pleadings mentioned by the fraudulent misrepresentations of the Defendants *Arthur Armistead* and *Richard Willis*.

Declare that the several agreements, entered into by the Plaintiff for the purchase of the said hereditaments and premises, and carried into effect and completed by him, ought to be rescinded; and let the same be delivered up to the Plaintiff to be cancelled.

Let the Defendant *Arthur Armistead* procure the deeds of covenant which were executed by the Plaintiff to be delivered up to be cancelled.

Refer

(*a*) 1 *Stark.* 65.

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Refer it to the Master to compute interest on the sums of 217*l.* and 2688*l.*, making together the sum of 2905*l.*, the amount of the purchase-money paid by the Plaintiff to the Defendant *Arthur Armistead*, after the rate of 4 per cent. from the times the said sums of 217*l.* and 2688*l.* were respectively paid.

Refer it to the Master to take an account of the money which has been paid by the Plaintiff in respect of the auction duty on the sale of the said premises; and also an account of the costs, charges, and expenses which have been paid and incurred by the Plaintiff, in consequence of, and incident to, the purchase; and also to take an account of the rents and profits of the hereditaments and premises come to the hands of the Plaintiff. And let what the Master shall find coming due on such account of rents and profits be deducted out of the sum of 2905*l.*, and what the Master shall find to be due in respect of the interest thereof, and the said auction duty, costs, charges, and expenses; and let the balance, which shall be coming due to the Plaintiff, be paid to him by the Defendant *Arthur Armistead;* and, upon such payment, let the Plaintiff reconvey to the Defendant *Arthur Armistead* the said hereditaments and premises. And let the deeds of covenant which have been executed by the Plaintiff, as in the said bill mentioned, be delivered up to be cancelled; and let the Master tax the Plaintiff his costs of this suit; and let the Defendants, *Arthur Armistead* and *Richard Willis*, pay to the Plaintiff such costs when so taxed, with liberty to any of the parties to apply.

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July 25.

PEARCE *v.* VINCENT.

A testator devised his real estates to his first cousin *Thomas Pearce* for life, and after *T. P.*'s decease, he devised and bequeathed all his real and personal estates in trust for such of his relations of the name of *Pearce*, being a male, as *T. P.* should by deed or will appoint; and in default of such appointment, for such of his relations of the name of *Pearce*, being a male, as *T P.* should approve of or adopt, if he should be living at the death of *T. P.* and his heirs, executors, &c. And in case *T. P.* should not adopt any such male relation, or no such male relation should be living at the death of *T. P.*, then to the next and nearest relation, or nearest of kin of him, the testator, of the name of *Pearce*, being a male; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever.

The testator had a brother, *Z. P.*, who had gone to sea, and had not been heard of for many years; and, supposing *Z. P.* to have died without issue, the nearest relation of the testator, answering the description in the ultimate limitation, at his decease, was the tenant for life, *T. P.*; and next to him, *R. P.*, the Plaintiff.

T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will.

Held, that *T. P.* took under the ultimate limitation.

RICHARD PEARCE, by his will, dated the 30th of *March* 1813, after devising certain estates to be sold for the payment of debts and legacies, and giving the surplus of the produce of sale, after such payment, to his cousin *Thomas Pearce;* and after bequeathing an annuity of 200*l.* to *Mary Heywood*, to be paid out of his freehold and copyhold estates not thereinbefore devised, gave and devised his manors of *Flamstead* and *St. Agnells*, in the county of *Hertford*, and his manor of *Stanwick*, in the county of *Northampton*, and also all and every his lands, real estates, and hereditaments, both freehold and copyhold, situate in the counties of *Hertford*, *Leicester*, and *Northampton*, (except the estates before devised to be sold, and the advowson of the rectory of *Husbands Bosworth*,) or elsewhere, unto his said cousin *Thomas Pearce* and his assigns for and during the term of his natural life; and he gave, devised, and bequeathed all his said manors, and his advowson of *Husbands Bosworth* aforesaid, and all his lands and hereditaments situate in the counties of *Hertford*, *Leicester*, *Northampton*, and elsewhere, and all

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all his stocks, funds, and securities for money, and all and singular other his real and personal estate, save and except as thereinafter was specifically bequeathed or mentioned, and also all his copyhold lands and hereditaments, except the estates before devised to be sold, subject nevertheless to the life estate thereinbefore given to his said cousin *Thomas Pearce*, of and in the said manors and manorial rights, lands, and hereditaments, and to the payment of the annuity therein mentioned, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, declarations, and agreements thereinafter mentioned, expressed, and declared; and from and after the decease of his said cousin *Thomas Pearce*, he devised all and singular the said premises, as well his real estate as personal, to the trustees therein named, in trust for such of his relations of the name of *Pearce*, being a male, as his cousin the said *Thomas Pearce* should by deed or will, in manner therein mentioned, give, devise, or bequeath or nominate, or appoint the same to; and in default of any such gift, devise, bequest, or nomination or appointment by his said cousin *Thomas Pearce* to or in favour of any such male relation of him the testator of the name of *Pearce* as aforesaid, then he devised the said estates and premises to the trustees in trust for such of his the testator's relations of the name of *Pearce*, being a male, as the said *Thomas Pearce* should approve of or adopt for the purposes of education, (which the testator authorised and directed the said *Thomas Pearce* to do as soon as he could conveniently after his the testator's decease,) if he should be living at the time of the decease of his said cousin *Thomas Pearce*, and his heirs, executors, administrators, and assigns for ever; and in case the said *Thomas Pearce* should not have approved of or adopted any such male relation as aforesaid, or in case

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he should have made such approval and adoption, and there should not be any such male relation living at the time of the decease of the said *Thomas Pearce*, then he devised the said estates and premises in trust for the next or nearest relation, or nearest of kin of him the testator of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one of equal degree, who should be living at his the testator's decease, his heirs, executors, administrators, or assigns for ever. And as to the advowson of *Husbands Bosworth* aforesaid, the testator gave the first and next presentation to the same rectory which should happen after his decease to certain persons therein mentioned in succession; and in case none of them should choose to present or refuse the same, then he directed that the presentation to his said rectory should at all times go and belong to his said cousin *Thomas Pearce* to present to at all times during the life of the said *Thomas Pearce*. And the testator gave all his plate, books, &c. and household furniture to his executors in trust to permit his said cousin *Thomas Pearce* to have, use, and enjoy the same during his life, and after his decease, then in trust for the persons who should succeed to or inherit the testator's real estates under and by virtue of his will; and the testator declared his will to be, and he thereby ordered and directed the said *Thomas Pearce* to pay and apply so much of the rents and profits of his said estates so given, devised, and bequeathed by the testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him the testator of the name of *Pearce*, whom his said cousin should approve of and adopt in manner aforesaid, in case such male relation should at the time of such adoption be a minor under age, until such

such person should have attained his age of twenty-one years, and invest the residue of the said annual sum of 200*l.* (not expended in such maintenance and education) at interest to accumulate, in the name of his said cousin *Thomas Pearce*, in some of the public funds, or upon government or real securities, during the minority of such male relation of the name of *Pearce;* and the testator declared and directed that his said cousin *Thomas Pearce*, his executors and administrators, should stand possessed of such accumulations in trust for the benefit of such male relation of the name of *Pearce*, and the same, with the dividends and interest, should be assigned to him at such times and in such proportions, after he should have attained the age of twenty-one years, as his said cousin *Thomas Pearce*, his executors or administrators should think most to his advantage; and in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the name of *Pearce*, as should, upon the decease of his the testator's said cousin, become entitled to his the testator's estates by virtue of his will; and in case such male relation of the name of *Pearce*, so approved of and adopted by his said cousin *Thomas Pearce* as aforesaid, should in the lifetime of his said cousin attain twenty-one years of age, then the testator willed and directed his said cousin *Thomas Pearce*, during his life, to pay and allow, out of the rents and profits of the estates so devised to him for his life as aforesaid, unto such male relation from the time of his attaining twenty-one years of age, the whole of the said annual sum of 200*l.*; provided also, and the testator declared that it should be lawful for, and he did thereby authorise and empower his said cousin *Thomas Pearce* to demise or lease all or any part of his said manors, farms, lands, and tenements for any term of years, not exceeding seven years, to take effect in

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possession, and at the best and most improved annual rent presently payable, and without taking any fine or premium as therein mentioned.

The testator died on the 3d of *January* 1814, leaving his sister his heiress at law, who afterwards died without issue; *Thomas Pearce*, the son of the testator's uncle *Robert Pearce*, who was the person named as the testator's first cousin in the will, and who was at the testator's death sixty-seven years of age; *Richard Pearce*, the Plaintiff in this suit, who was the son of the testator's uncle *William Pearce*, and who was sixty-six years of age at the testator's death; and *William Pearce*, brother of the Plaintiff, who was, at the decease of the testator, fifty-nine years of age.

Thomas Pearce died without issue, on the 18th of *May* 1827, having never exercised his power of appointment or adoption in favour of any relation of the testator, and having made his will, by which he devised all his real estate to a stranger.

The question in the cause was, whether the Plaintiff or *Thomas Pearce* took any, and what, interest under the ultimate limitation contained in the will of the testator.

The cause came on to be heard before the Master of the Rolls (Sir *John Leach*), on the 17th of *January* 1833, when his Honor, considering the question arising upon the will to be a legal question affecting real estate, directed a case to be sent to the Court of Exchequer.

A pedigree was annexed to the case sent to the Court of Exchequer, by which it appeared that the testator had a brother of the name of *Zachary Pearce*, who had gone to sea, and had not been heard of for many years. The questions

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questions for the opinion of the Court were, first, whether, under the circumstances stated, *Thomas Pearce* took any, and what estate, under the ultimate limitation contained in the will of the testator; secondly, whether the Plaintiff *Richard Pearce* took any, and what estate under the ultimate limitation in the will.

The following certificate was returned, after argument (*a*), by the Judges of the Court of Exchequer:—

This case has been argued before us by counsel; we have considered it, and are of opinion that, under the circumstances here stated, if *Zachary Pearce*, the testator's brother, died without issue in the lifetime of the testator, *Thomas Pearce* took, under the ultimate limitation in the testator's will, an estate in fee simple in the testator's real estates, and an absolute interest in his personalty.

LYNDHURST.
J. BAYLEY.
J. VAUGHAN.
W. BOLLAND.

The cause came back to be heard upon this certificate on the 10th of *June* 1833, when Sir *John Leach* expressed his dissatisfaction at the opinion given by the Court of Exchequer, and his regret that he had sent the case to a court of law at all; but, having once taken that course, he considered it proper to take the further opinion of a court of law, and he accordingly, directed the same case to be sent to the Court of Common Pleas. The arguments, and the observations made by Sir *John Leach*, on the cause coming back to be heard upon the certificate of the Court of Exchequer are fully reported in

(*a*) The argument is reported in 1 *Crompt. & Mees.* 598.

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in the second volume of Messrs. *Mylne* and *Keen's Reports*, p. 800.

The case was argued (*a*) before the Judges of the Court of Common Pleas, on the 12th of *June* 1835, and the Judges of that Court afterwards returned the following certificate:—

This case has been argued before us by counsel, and we have considered the same; and assuming *Zachary Pearce*, the testator's brother, to have died without issue in the testator's lifetime, we think that, under the circumstances above stated, *Thomas Pearce* took an estate in fee under the ultimate limitation contained in the will of the testator. In consequence of our answer to the first question it becomes unnecessary to answer the second.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. VAUGHAN.

The cause now came back to be heard upon this certificate.

Mr. *Wright* and Mr. *Rogers*, for the Plaintiff, submitted that the opinion of the courts of law had been taken to assist the judgment of this Court, not to control it; and that these opinions, if they should be found irreconcileable with the principles which had been recognised both by courts of equity and of law in the construction of wills, ought not to influence the Court in the determination of this case. The intention of the testator

(*a*) The argument is reported in 2 *Bingh. N. C.* 328.; and in 2 *Scott*, 347.

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testator not to include *Thomas Pearce* in the description of the person who was to take under the ultimate limitation was clearly to be collected from the whole context of the will, and, if that intention was clear, and not inconsistent with any rule of law, the Court was as much bound to give effect to it, as if the testator had in express words excluded *Thomas Pearce*. In *Doe dem. Long* v. *Laming* (*a*), Mr. Justice *Wilmot* said "all cases which depend upon the intention of the testator, which is the pole-star for the direction of devises, are best determined upon comparing all parts of the devise itself." In *Baddeley* v. *Leppingwell* (*b*), the same Judge said that the intention of a testator was to be collected from the whole of his will, *ex visceribus testamenti*. So in *Crone* v. *Odell* (*c*), the Court said that a will could not be construed by adverting to a single clause of it, but every thing that bears upon the subject must be taken together to discover what the testator intended. Applying these principles to the present case, it was impossible to consider the various provisions in this will, which were inconsistent with an intention to give more than a life-interest to *Thomas Pearce*, without also coming to the conclusion that it was the intention of the testator to exclude *Thomas Pearce* from taking under the ultimate limitation. If the Court should concur with the courts of common law in holding that *Thomas Pearce* took a fee under the limitation, the main object of the testator, which was to keep his estates in his own family, and in the possession of a relative bearing his own name, and to secure which he gave *Thomas Pearce* only a limited power of appointing to a male relative of the name of *Pearce*, would be defeated; for the owner of the fee might of course alienate to a stranger. The general

(*a*) 2 *Burr.* 1112.
(*b*) 3 *Burr.* 1541.
(*c*) 1 *Ba. & Bea.* 466.

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general intent of the testator, manifested throughout the will, was, that none but a person of his own name should enjoy his property; and even if the language of the ultimate limitation were inconsistent with that general intent, it had been held that, where a particular intent clashed with the general object and intention of the testator, the particular must give way to the general intent. *Chapman* v. *Oliver* (*a*), *Crone* v. *Odell* (*b*). It was true the authorities had established the general principle that a person taking a partial interest under a deed or will was not, on that account, excluded from taking a larger interest under another description in an ultimate limitation. *Cholmondeley* v. *Clinton* (*c*), *Holloway* v. *Holloway* (*d*), *Doe dem. Garner* v. *Lawson* (*e*), *Elmsley* v. *Young* (*g*). But, where this point was raised in a will, the question was whether it was the intention of the testator to exclude the person to whom he gave a partial interest from taking any benefit under the ultimate limitation, and that intention was to be collected from the whole will, and had in several cases been inferred from particular expressions, inconsistent with the application of the general principle, and constituting an exception to it. *Jones* v. *Colbeck* (*h*), *Bird* v. *Wood* (*i*), *Briden* v. *Hewlett* (*k*). Looking to the whole context of the will, it was clearly the intention of the testator to give a life interest and no more to *Thomas Pearce*, and the words "next and nearest relation" must be taken to mean next and nearest after *Thomas Pearce*.

Mr. *Pemberton* and Mr. *Preston*, *contrà*, admitted it to be sufficiently clear that it was not in the contemplation of the testator that *Thomas Pearce* might possibly

(*a*) 3 *Burr.* 1635.
(*b*) 1 *Ba. & Bea.* 470.
(*c*) 2 *J. & W.* 1.
(*d*) 5 *Ves.* 399.
(*e*) 3 *East*, 278.
(*g*) 2 *Mylne & Keen*, 82. 780.
(*h*) 3 *Ves.* 38.
(*i*) 2 *Sim. & Stu.* 400.
(*k*) 2 *Mylne & Keen*, 90.

sibly answer the description of the person who was to take under the ultimate limitation, and that there were dispositions in the will inconsistent with an intention to make *Thomas Pearce*, in his individual character, the object of his bounty in that ultimate limitation. All the observations of Sir *John Leach*, when he expressed his disapprobation of the certificate returned by the Court of Exchequer, were founded upon the assumption that, if *Thomas Pearce* could take under the ultimate limitation, he must take, because it appeared from the will that, in the events which had happened, he should take. "Is there," said his Honor, "to be found in this will a clearly expressed intention, on the part of the testator, that the remainder should extend to *Thomas Pearce;* or would not any man of plain understanding say that it is the clear intention of the testator that *Thomas Pearce* should not take under this limitation?" (*a*) The answer to this is, that the reasoning is founded on the supposition that the testator knew that *Thomas Pearce* would or might be the person answering the description in the ultimate limitation, whereas the testator did not and could not know what the state of his family would be at the time when the ultimate limitation was to take effect. By that limitation he gives his estates, in certain events, to a person who should answer a particular description, and *Thomas Pearce* happened to be the person answering that description. *Thomas Pearce* was clearly not in the testator's contemplation: neither he nor any other individual was the particular object of the testator's bounty; but *Thomas Pearce* was within the scope of the testator's general intention indicated by a gift to a person who should answer a certain description. The testator could not know that *Thomas Pearce* would be the person who would

(*a*) *Pearce* v. *Vincent*, 2 *Mylne & Keen*, 812.

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would answer the particular description; and, in fact, there might still be a person who would exclude *Thomas Pearce;* for *Zachary Pearce*, the testator's brother, went to sea, and since the year 1795 had not been heard of. Both courts of law to which the case had been sent having come to the same conclusion, they submitted that the certificate ought to be confirmed, and the bill dismissed.

The MASTER *of the* ROLLS.

It is somewhat embarrassing to be obliged to decide a case in which Sir *John Leach* expressed an opinion so opposite to that which has been given by the two courts of law; but as the case has not suggested to my mind any such doubt as that which was entertained by Sir *John Leach*, and as it is desirable that the litigation which this question has occasioned should cease, I will not delay the expression of the opinion which I have formed upon it. The question is, whether *Thomas Pearce*, being devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation which he afterwards filled.

(His Lordship here stated the material limitations of the will.)

It is tolerably clear that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been devested by the appointment of *Thomas Pearce*, or by his adoption of a male relation of the name of *Pearce*, but was, in default of such appointment or adoption, to take effect. If it should

should so happen that *Thomas Pearce*, the devisee for life, should also, at the death of the testator, answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued that he ought, because the gift to *Thomas Pearce* for life, and the restrictions put upon him, in his character of tenant for life, are wholly inconsistent with an intention, on the part of the testator, to give him the absolute power over the estate. But the testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to *Thomas Pearce*. The argument derived from intention does not apply in this case; and I am of opinion that, upon the true construction of the will, *Thomas Pearce* took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given. The bill must, therefore, be dismissed.

1838.

1838.
March 1, 2.

MOORE *v.* FROWD.
——— *v.* ABBOTT.
BOND *v.* FROWD.
——— *v.* ABBOTT.

A decree *nisi* was taken against a Defendant, who did not appear at the hearing. Judgment was pronounced by the Master of the Rolls, after his appointment to the office of Lord Chancellor, by consent of all the parties to the cause except theDefendant, and another party who did not appear at the hearing. The Defendant could only shew cause against the decree *nisi* by setting down the cause to be heard against him; and a petition to stay proceedings to make the decree absolute, on the ground of his being no party to the consent to have the cause decided by the Master of the Rolls after he became Lord Chancellor, was dismissed with costs.

THESE causes were heard before the present Lord Chancellor when Master of the Rolls, during five days, towards the end of the month of *December* 1835, and on the 13th and 14th of *January* 1836, and, on the last-mentioned day they were ordered to stand for judgment. The Defendants *William Elkington* and *George Richards Elkington* did not appear, and, on the affidavit of service of *subpœna* to hear judgment being produced, the Plaintiffs took such decree against them as they could abide by. On the 16th of *January* 1836, the Master of the Rolls being about to be elevated to the office of Lord Chancellor, his secretary applied to the several parties in the cause to sign a consent to the Master of the Rolls giving judgment in these causes, after his appointment to the office of Lord Chancellor, and to be bound by the same as if it had been given previously to his vacating the office of Master of the Rolls, and that the decree or order should bear date that day the 16th of *January* 1836. All the Defendants, except *William Elkington* and *George Richards Elkington*, signed a consent to this effect.

The Lord Chancellor pronounced his judgment in these causes on the 15th of *August* 1837. The decree, as originally drawn up by the Registrar, was dated on the day on which the judgment was delivered; but,

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but, an objection having been taken to the minutes on that ground, the matter was spoken to on the 16th of *December* 1837, when the Lord Chancellor directed that the decree should bear date the 16th of *January* 1836, in conformity with the terms of the consent.

A petition was now presented by *William Elkington*, stating that he had been served, on the 5th of *February* 1838, with a copy of a *subpœna* to shew cause why a decree made by his Honor the Master of the Rolls on the 16th of *January* 1836, in the above-mentioned causes, should not be binding against him, in default whereof such decree was to stand and be made absolute against him; that the petitioner was informed and believed that no decree was pronounced in these causes on the day on which it purported to bear date, but that such decree was pronounced by the present Lord Chancellor on the 15th of *August* 1837, by the consent in writing of some of the other parties, to which consent the petitioner was not a party. The petitioner prayed that all proceedings to make the decree absolute against him might be stayed.

For the petitioner it was said that this was a mere question of jurisdiction. The judgment of the Lord Chancellor, upon a case which he had heard as Master of the Rolls, could only bind those parties who consented to be bound by it. It was, in fact, the opinion of an arbitrator, binding against those parties, but having no force against the Defendants who were no parties to the consent. The decree *nisi* taken by the Plaintiffs in a cause where, as against the petitioner, no decree was ever pronounced, was irregular, and could not be made absolute. *Powell* v. *Martin* (*a*), and *Rumney* v. *Morgan* (*b*), were cited.

On

(*a*) 1 *J. & W.* 292. (*b*) 4 *Price*, 266.

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On the other side, it was contended that, the Defendant *William Elkington* having made default at the hearing, it was not open to him to apply by petition; but that he could only shew cause against the decree *nisi* by setting down the cause to be heard against him. *The Margravine of Anspach* v. *Noel.* (*a*) The petitioner was a co-trustee with the Defendant *Frowd* and two other solicitors against whom the decree directed an account. He had become a bankrupt; and the decree was not made against him personally, but gave liberty to the Plaintiffs to go in with the other creditors under his bankruptcy. He had, consequently, no interest in the suit; and this was in reality the application of the Defendant *Frowd*, who was desirous of defeating the operation of the decree. The time, given in the *subpœna*, for shewing cause against the decree, had expired, and the decree had, in fact, been made absolute, so that, even if the petitioner had been right in coming here by way of petition, he was too late.

The MASTER *of the* ROLLS was of opinion that from the time the petitioner made default at the hearing, and the decree *nisi* was taken against him, he was bound by that decree, until he shewed cause against it, which he could only do by setting down the cause to be heard against him. The petition prayed that all proceedings to make the decree absolute might be stayed, when in fact the decree had been made absolute. Upon these grounds, even if there were no other circumstances in the case rendering it impossible to entertain this application, the petition must be dismissed with costs.

(*a*) 19 *Ves.* 573.

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DAVIS *v.* DOWDING.

Feb. 28.

THE Plaintiffs were mortgagees in fee of certain real estates of the testator *John Winpenny*, and the bill was filed against the trustees and executors under the will, the infant devisee and heir at law of the testator, and other parties, for the purpose of realising the Plaintiffs' security by the sale of the mortgaged premises. The bill stated that, by a decree made in two suits of *Courtney* v. *Courtney* and *Sampson* v. *Courtney*, one, the suit of a legatee under the will of the testator, and the other, a creditor's suit, the usual accounts of the testator's personal estate had been directed, and also inquiries respecting certain canal and *Bristol* dock shares belonging to the testator; and that the Master had prepared the draft of his report, and that it had been ascertained that the testator's personal estate was insufficient for the payment of his debts. The bill further stated, that the Plaintiffs had been advised that they were not entitled to receive the personal estate of the testator to the prejudice of creditors not having other security for their debts, but that they ought to realise their mortgage security, and only come upon the testator's personal estate for the deficiency; and it prayed that the present suit might, in case of need, be taken as a supplemental suit to the suit of *Sampson* v. *Courtney*, and that the mortgaged premises might be sold, and the Plaintiffs' debt satisfied out of the produce of sale of the mortgaged premises, and the personal estate of the testator; and that the canal and *Bristol*

Where a decree had been made in two suits, framed for the purpose of administering the testator's personal estate only, and the devisee of the real estate was an infant, a suit by mortgagees, for the purpose of realising their security by a sale of the mortgaged premises, was properly instituted.

In a suit for realising a mortgage security, where the devisee or heir of the mortgagor is an infant, the Court usually directs a reference to the Master to inquire whether a sale of the mortgaged premises will be for the benefit of the infant; but, where it is clear that such sale will be for the infant's benefit, the Court will direct a sale in the first instance.

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Bristol dock shares might, if necessary, be sold for that purpose.

An objection was raised by the answers of some of the Defendants, that this suit was irregular and unnecessary, inasmuch as the Plaintiffs might have gone in and proved their debt under the decree in the two suits, and had the mortgaged estates sold in those suits.

Mr. *Pemberton* and Mr. *O. Anderdon*, for the Plaintiffs, cited *Greenwood* v. *Taylor* (*a*) as an authority, shewing that the Plaintiffs were right in resorting first to their mortgage security; and they insisted that, as the heir and devisee under the will of the testator was an infant, the benefit of that security could only be obtained by a separate suit.

Mr. *Romilly*, for the infant heir and devisee of the testator, and Mr. *Rogers*, Mr. *Koe*, Mr. *Piggott*, Mr. *Bagshawe*, and Mr. *Rasch*, for the other Defendants, contended that the Plaintiffs might have obtained the benefit of their security by a sale of the mortgaged premises on a petition presented in the creditors' suit, and that the Plaintiffs ought not to be allowed their costs in this suit, which was unnecessary and irregular in point of form. The authority of *Greenwood* v. *Taylor*, which had never been acquiesced in by the profession, was shaken by the observations of the Lord Chancellor in the recent case of *Mason* v. *Bogg* (*b*), where this subject had been much considered, and inquiries made into the practice in the Masters' offices, the result of which was to shew, that mortgagees were not put upon terms, as was the practice in bankruptcy, but that they might come in, as creditors, to prove on their mortgage bond, or on the covenant in their mortgage deed, as specialty creditors

(*a*) 1 *Russ. & Mylne*, 185. (*b*) 2 *Mylne & Craig*, 443.

creditors for the whole amount of the principal and interest due to them.

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Mr. *Pemberton*, in reply, said he had been furnished, since the opening of this case, with an office copy of the decree made in the two suits. *Sampson* v. *Courtney* was the suit of a creditor by simple contract; the other was a legatee's suit; and in neither of them was the real estate of the testator sought to be administered. How was it possible, therefore, to obtain a sale of the mortgaged estates, on a petition presented in these suits, or how could the infant heir and devisee be bound by such a proceeding? In the case of *Mason* v. *Bogg*, the Lord Chancellor thought the matter was not in such a state as to call for an opinion on the question which arose in *Greenwood* v. *Taylor*, and the principle laid down, therefore, in that case, must be considered as the law of this Court.

The MASTER *of the* ROLLS said that, until the nature of the two suits in which the decree had been made was distinctly shewn, his impression was that this suit was irregular, but as no order for the sale of the real estates could be made in those causes, the Plaintiffs were entitled to the relief prayed by their bill, a reference being first made to the Master to inquire whether it would be for the benefit of the infant that the estate should be sold. Where, from the circumstances of the case, it appeared to be clear that a sale would be for the benefit of the infant, the Court would direct a sale in the first instance; but, in this case, the usual reference should be made.

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It was afterwards discovered that the heir and devisee of the testator had, in fact, attained his majority

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some time previous to the date of the decree; and, at the next seal, Mr. *Pemberton*, on behalf of the Plaintiffs, moved that the decree might be varied by directing the Master to sell the mortgaged estate. He cited *Geary* v. *Geary* (*a*), *Daniel* v. *Skipwith* (*b*), and *Brocklehurst* v. *Jessopp* (*c*), in support of the motion.

Mr. *Romilly*, for the heir and devisee, said that the Defendant, for whom he appeared, had had no opportunity of making any application to the Court in his adult character; that the bill did not pray a foreclosure, and might be dismissed with costs upon a proper answer put in by the heir and devisee; and he submitted that the suit could not be disposed of until the rights of the heir and devisee in his adult character should be brought before the Court, and determined in a supplemental suit.

Mr. *Pemberton*, in reply, insisted that he was entitled to the order for which he now moved.

The MASTER *of the* ROLLS said that the fact of the infant heir and devisee having attained his majority was a fact which he might be presumed to have known; and that he might, if he had thought proper, on attaining his age, have made a new defence, or applied for leave to redeem. During his infancy, the Defendant sustained no disadvantage; and it was his own default if, when he attained his full age, he had omitted to make any application, which, it was suggested at the bar, might have aided his defence. The cause having been heard; no such application having been made; and there being no allegation of surprise or want of notice, the Plaintiffs were entitled, under the circumstances, to a sale of the mortgaged estates.

(*a*) *Seton on Decrees*, 173.
(*b*) 2 *Bro. C. C.* 155.
(*c*) 7 *Sim.* 436.

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BETWEEN

MARY WILSON - - - Plaintiff,

AND

WILLIAM WILSON, the Elder, WILLIAM WILSON, the Younger, BENJAMIN WILSON, and JOHN WILSON - - Defendants.

March 9.

By Bill of Revivor

BETWEEN

EMIL CHRISTIAN GROSSLOB and MARY his Wife, late MARY WILSON - - Plaintiff,

AND

The same - - - - Defendants.

Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by the Plaintiff, who was entitled to the rents and profits for her life, against the trustees, the Court ordered a receiver to be appointed, and the costs of the suit to be paid by the trustees.

BY indentures of lease and release, dated the 12th and 13th days of *October* 1827, and made between *Benjamin Wilson* the elder, the father of the Plaintiff, of the first part; the Defendant, *William Wilson* the elder, the uncle of the Plaintiff, and the other three Defendants, the brothers of the Plaintiff, the four Defendants being the trustees nominated and appointed by and on behalf of the Plaintiff, of the second part; and *John Fogg* of the third part; *Benjamin Wilson*, the elder, being seised in fee-simple of the lands and messuages thereinafter described, conveyed the same, subject to the leases therein mentioned, to the use of himself for life; and after his decease, to the use of the four Defendants for the term of ninety-nine years, upon trust to receive the rents and profits of the said lands, messuages, and tenements, and after deducting all necessary charges and expenses for repairs, insurance, and otherwise, to pay the same to the Plaintiff for her sole and separate use and benefit, maintenance and support; and

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after the decease of the Plaintiff, to the use of her child or children; and in default of such issue, to the use of the Defendants, their heirs and assigns.

Benjamin Wilson, the elder, died on the 18th of *June* 1832. *William Wilson*, the younger, received the rents and paid them over to the Plaintiff until the month of *October* 1833, when the other three trustees served a notice upon the tenants not to pay their rents to *William Wilson*, the younger, alone, or except upon receipts signed by all the trustees. In consequence of this notice the tenants refused to pay their rents to *William Wilson*, the younger, alone. Some time after, an arrangement was entered into, by which the trustees agreed that *Edward Sells* should receive the rents for a year under a power of attorney; and *Sells* did, accordingly, receive the rents for a year, but at the expiration of that time, the Defendant, *Benjamin Wilson*, refused to concur in that arrangement, and insisted that he would take the receipts of the rents and the management of the trust property into his own hands. The disputes between the trustees continued; the tenants refused to pay their rents except upon receipts signed by all the trustees, and the rents were in arrear. On the 31st of *October* 1835, the bill was filed by the Plaintiff. It stated the above-mentioned facts; that various endeavours had been made by and on behalf of the Plaintiff to induce the Defendants to make such arrangements as might secure to her the punctual receipt of her income, and, among others, that the Defendants should execute a power of attorney to some person to be appointed by the Plaintiff to receive the rents, and that the Defendant, *William Wilson*, the younger, was ready to accede to such proposal, but that the other Defendants refused to do so, and insisted that the Defendant, *Benjamin Wilson*, the younger, should exclusively

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clusively act in the management of the trust property, to which last-mentioned proposal the Defendant, *William Wilson*, the younger, refused to consent. The bill prayed that the due performance of the trust, and the receipt and payment of the arrears of rent, and the punctual receipt and payment of the future accruing rents might be enforced and effected under the decree of the Court, and that, for that purpose, a receiver might be appointed, and that the Defendants might pay the costs of the suit.

On the 31st of *May* 1836, the Plaintiff intermarried with *Emil Christian Grosslob*, and the suit was revived by *Grosslob* and his wife (*a*) against the same Defendants. The Defendants answered separately, and substantially admitted the case made by the bill.

Mr. *Pemberton*, for the Plaintiffs, asked either that the trustees might be removed and new trustees appointed; or that a receiver might be appointed, and that the Defendants might be ordered to pay the costs of the suit.

Mr. *Treslove* and Mr. *Whitmarsh*, for the three Defendants *William Wilson*, the younger, *Benjamin Wilson*, and *John Wilson*, said, that these Defendants were ready to concur in the same arrangement for the receipt of the rents, which was opposed by only one of the trustees, and they submitted that, in such a case, the Court would adopt the acts of the majority of the trustees.

Mr. *Blunt*, for *William Wilson*, the younger, submitted that the case of this Defendant was distinguishable

(*a*) See *Wake* v. *Parker*, 2 *Keen*, 59.

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able from that of the other trustees, and was in fact distinguished by the statement in the bill, and that he ought not, therefore, to be ordered to pay any part of the costs.

The MASTER *of the* ROLLS.

In this case the Plaintiff, without any fault or neglect on her part, but in consequence of the disputes among the Defendants, the trustees, has been compelled to come into this Court to ask for that relief which all have admitted that she is clearly entitled to. One thing is perfectly clear — that she ought not to pay the costs of this suit, but that they must be defrayed by those who have compelled her to institute it. As to the substantial relief to which she is entitled, there is no difficulty; a receiver must be appointed in order to secure to her the recovery of the arrears of rent, and the punctual payment of the accruing rents. The costs of the suit up to this time must be paid by some or one of the Defendants; and upon the answers which have been separately put in by them, I cannot, at present, adjudicate. Their conduct has been highly improper and absurd: instead of joining to do what was beneficial to their *cestui que trust*, each seems to have endeavoured to appropriate to himself the credit of managing this small property, and to exclude one or both of the others. At present I cannot tell which has been the most in the wrong; and the only order which the Court can now make is, that the costs be paid by the Defendants generally, unless an inquiry be asked by the Defendant, *William Wilson*, the younger, or any other of the Defendants, under what circumstances the Plaintiff has been prevented from receiving her income. If that inquiry be asked for the purpose of having an adjudication

judication in respect of costs between the Defendants, the Court will direct it.

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The inquiry was waived by the Defendants, and the decree was accordingly made for a receiver, and for payment of the costs of the suit by the Defendants.

NELTHORPE *v.* WRIGHT.

March 12.

MR. *WILLIAMS* moved for a serjeant at arms under the 1 *W.* 4. *c.* 36. *s.* 15. rule 1. The affidavit of the Plaintiff's solicitor, by whom the writ of attachment was issued, stated his belief that the Defendant was in the county into which the writ was issued, and it stated, upon the deponent's information and belief, the steps taken by the officer, for the purpose of shewing that due diligence had been used in endeavouring to apprehend the Defendant; but it did not state the deponent's belief that due diligence had been used. He referred to the case of *Wright* v. *Green* (*a*), where Lord *Brougham* held this to be unnecessary, and he submitted that the act did not in terms require the deponent to swear to his belief that due diligence had been used, though it did expressly require him to swear to his belief, at the time of suing forth the writ, that the Defendant was in the county into which the writ was issued. If the deponent stated, upon his information and belief, acts done by the officer from which the Court was enabled to infer that due diligence had been used to ascertain the place where the Defendant was at the

The Court will not make an order for a Serjeant at Arms, unless the affidavit of the solicitor or town agent, by whom the writ of attachment was issued, states his belief that due diligence had been used in endeavouring to apprehend the Defendant.

(*a*) 2 *Russ. & Mylne*, 93.

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the time of issuing the writ, and in endeavouring to apprehend the Defendant, the deponent's belief, as to the sufficiency of the steps so taken by the officer to shew that due diligence had been used, was immaterial.

The MASTER *of the* ROLLS.

The Court is to be satisfied by affidavit that due diligence has been used; and, if every fact bearing on that result was stated, the inference might safely be drawn, and an affidavit of the facts only would be sufficient. But of all the facts bearing on the result, some only may be stated, whilst others within the knowledge of the party may be omitted; and the effect of the omitted facts might, if they were produced, be such as altogether to change the tendency of those which are stated, when taken by themselves; and, as a mode of guarding against the omission of important facts in an *ex parte* proceeding, it appears to me proper to require the person, whose duty it is to ascertain all the facts, to state his belief that the inference he desires the Court to deduce from the particular facts which he adduces is true, or, in other words, that due diligence has been used.

Motion refused.

March 31. The motion was afterwards renewed upon an affidavit amended in conformity with this decision, and his Lordship made the order.

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STUBBS *v.* SARGON.

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Aug. 7.

A testatrix devised to trustees and their heirs, her copyhold dwelling-house, garden, and ground, together with the furniture and effects therein; and also the ten cottages, and two new cottages built by her, with their appurtenances

ELIZABETH IVES, by her will dated the 11th of *September* 1832, gave and devised to *George Sargon*, *George Fuller*, *John Henry Padbury*, and *Edward Ives Fuller*, and to their heirs and assigns, all that her copyhold messuage or tenement and dwelling-house, garden and ground wherein she then principally resided, together with the furniture and effects therein, and the coach-house and stable thereto belonging, and also the ten cottages and two new cottages built by her, with their appurtenances, at *Lampton*, to hold the same, with the

at *L.*, upon trust, to pay the rents of the said hereditaments to her niece *S. S.*, the wife of *G. S.*, or to permit and suffer her to use and occupy the said hereditaments during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to *G. S.* for his life, and after his decease to stand possessed of the said hereditaments, in trust, for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as *S. S.* should appoint; and in default of appointment, upon trust to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her residuary personal estate.

Held, that the furniture and effects did not pass to *S. S.*, but belonged to the residuary legatees.

The testatrix gave certain freehold and leasehold premises to trustees, in trust after the decease of *M. I.*, to dispose of and divide the same unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit.

Held, that this was a good devise to the persons to whom it was ascertained that the testator had disposed of her business in her lifetime.

In the residuary clause, "and" was read "or," to effectuate the plain intention of the testatrix.

E. I. indorsed a promissory note for 2000*l.* and sent it to *S. S.* in a letter, whereby she gave the same to *S. S.* for her sole use and benefit, for the express purpose of enabling her to present to either branch of her family any portion of the interest or principal thereon, as she might consider most prudent; and in the event of the death of *S. S.*, by that bequest, she empowered her to dispose of the said sum of 2000*l.* by will or deed, to those or either branch of the family she might consider most deserving thereof.

Held, that this letter created a trust, the objects of which were too undefined to enable the Court to execute it, and that the 2000*l.* formed part of the testatrix's general personal estate.

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the appurtenances unto, and to the use of the said *George Sargon*, *George Fuller*, *John Henry Padbury*, and *Edward Ives Fuller*, their heirs and assigns, upon trust that they or the survivors or survivor of them, or the heirs and assigns of such survivor, should pay the rents, issues, and profits of the said hereditaments, into the proper hands of her niece, *Sarah Sargon*, the wife of *George Sargon*, or into the hands of such person or persons as she should, from time to time but not by way of anticipation, appoint to receive the same; or otherwise to permit and suffer *Sarah Sargon* to use and occupy the said hereditaments during her life, to the intent that the same hereditaments and the rents, issues, and profits thereof, might be for her sole and separate use, and not subject to the debts, control, disposition, or engagements of her present, or any future husband; and, after her decease, in trust for *George Sargon*, during his life; and after his decease, upon trust that her trustees, or the survivors, &c. should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces or grand-nephews and grand-nieces as the said *Sarah Sargon* should appoint; and in default of appointment, upon trust that the said trustees or the survivors &c. should sell and dispose of the said hereditaments and premises, and such part thereof, over which no appointment had been made; and the testatrix directed that the money to arise by such sale should fall into and form part of her residuary personal estate, and be disposed of as thereinafter mentioned.

The question as to this clause of the will was, whether the furniture and effects, therein mentioned, passed to *Sarah Sargon*, or belonged to the residuary legatees.

The testatrix gave, devised, and bequeathed to the same trustees, their heirs, executors, administrators, and assigns,

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assigns, according to the different natures and qualities thereof respectively, all that her freehold messuage or tenement, with the appurtenances thereunto belonging, situate No. 30., *Little Queen Street*, wherein she carried on her trade, together with her leasehold stables and warehouses behind the same, and also all her estate and interest in the leasehold manufactory and premises in *Maiden Lane*, in the parish of *St. Pancras*, with the appurtenances, together with all and singular the fixtures about the said messuage or tenement in *Little Queen Street* aforesaid, to hold the said freehold and leasehold messuages, tenements, stables, premises, and fixtures lastly thereinbefore devised and bequeathed, unto and to the use of the said trustees, their heirs, executors, administrators and assigns, upon trust that the said trustees or the survivors, &c., should by mortgage, sale, or other disposition of the said several hereditaments and premises, or any part thereof, or by and out of the rents, issues, and profits thereof, or of any part thereof, or by all or any of the said ways and means, raise and levy all such sum and sums of money, as should be requisite or proper for the payment and satisfaction of the taxes and repairs of the said hereditaments and premises, and the insurance thereof, and the rents reserved in respect of the said leasehold premises, and should pay and apply the moneys so to be raised for the answering of the said purposes accordingly. The testatrix proceeded as follows: — "And I do hereby declare and direct that, subject to the trusts hereinbefore expressed, the said trustees, their heirs, executors, &c., do and shall stand and be seised and possessed of and interested in the said several freehold and leasehold messuages, tenements, and hereditaments, fixtures and premises last hereinbefore devised and bequeathed, in trust to pay the rents, issues, and profits of the said hereditaments and premises, into the proper hands

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hands of my sister *Mary Innell*, or into the hands of such person as she shall appoint to receive the same, and to have the use of the said fixtures and premises during her life. And from and after her decease, in trust to dispose of and divide the same unto and amongst my partners, who shall be in copartnership with me at the time of my decease, or to whom I may have disposed of my said business, in such shares and proportions as my said trustees shall think fit and deem advisable."

The testatrix, at the date of her will, carried on the business of a varnish and colour maker, in co-partnership with her nephews, *John Dialls Innell*, *Charles Nolloth Stubbs*, *Samuel Silver*, and *Thomas Cookes*. She was entitled to the property on which the business was carried on, and to the capital engaged in it; and she was interested in the profit and loss of the concern to the amount of three-fourths, her partners being interested in the remaining fourth. She had no partners at the time of her death, having disposed of her business to *Samuel Silver*, *Thomas Cookes*, *Ann Abigail Innell*, and *John Ives*.

The questions, raised as to the last-mentioned clause in the will, were, first, whether the devise to persons who should be the partners of the testatrix at the time of her decease, or to whom she should have disposed of her business in her lifetime, was a good devise within the statute of frauds; and, secondly, whether it was or was not void for uncertainty.

The testatrix, by her will, directed her residuary personal estate to be divided among her nephews and nieces, and children of nephews and nieces therein mentioned, except as to her nephew *John Dialls Innell* and *Charles*

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Charles Stubbs, (who was the same person as *Charles Nolloth Stubbs*,) and her nieces *Caroline Ade* and *Sarah Cookes*, and such of her nephews and nieces as might be entitled to any beneficial estate, or interest in her freehold messuage in *Little Queen Street*, and leasehold premises in *Maiden Lane* under the devise thereof, whose shares in such residuary freehold estate she directed to be one-half of the amount of the share of her other nephews and nieces.

Charles Nolloth Stubbs took no beneficial interest in the devise of the freehold and leasehold premises in *Little Queen Street* and *Maiden Lane;* and the third question raised upon the will was, whether or not it was the intention of the testatrix to include *Charles Nolloth Stubbs* among the nephews and nieces who, by reason of their taking an interest in the devise of the freehold and leasehold premises, were to take only half the shares of the other residuary legatees.

On the 15th of *October* 1827, the testatrix lent to *George Fuller* the sum of 2000*l.*, the repayment of which was secured by the following promissory note: — "*October* 15th, 1827. On the 28th of *November* 1834, we promise to pay Mrs. *Elizabeth Ives*, or her order, the sum of 2000*l.*, with lawful interest at the rate of 5*l.* per cent. per annum, which interest we agree to pay every six months, commencing from the 28th of *November* next ensuing. — *George Thomas* and *Charles Fuller*."

On the 15th of *May* 1829, the testatrix, by a codicil to a former will (the will and codicil being both of them afterwards revoked), gave this sum of 2000*l.* to *Sarah Sargon*, for her own use, but with an express wish and desire that she should appropriate any part of it she might deem proper for the advancement or benefit of any

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any of the testatrix's nieces or nephews, or great nieces or nephews, she might think proper. But afterwards, and three or four days before the date of her will, the testatrix indorsed the promissory note and sent it to Mrs. *Sargon*, with a letter dated the 7th of *September* 1832, in the following words: — "The inclosed note of 2000*l.* I have given to Mrs. *Sarah Sargon* for her sole use and benefit, independent of her husband, for the express purpose of enabling Mrs. *Sargon* to present to either branch of my family any portion of the principal or interest thereon, as the said Mrs. *Sarah Sargon* may consider the most prudent; and, in the event of the death of Mrs. *Sarah Sargon*, by this bequest I empower her to dispose of the said sum of 2000*l.* and the interest, by will or deed, to those or either branch of her family she may consider most deserving thereof. To enable Mrs. *Sarah Sargon*, my niece, to have the sole use and power of the said sum of 2000*l.*, due to me by the above note of hand, I have specially indorsed the same in her favour. Signed by me, this 7th day of *September* 1832.

"Witness, *G. Fuller.* *E. Ives.*"

A fourth question in the cause was, whether Mrs. *Sargon* was entitled to this promissory note for her own use, or whether she held it in trust; and if in trust, for what objects.

The bill was filed for the administration of the testatrix's personal estate by some of the residuary legatees or their representatives against the executors, who were also trustees, and the executrix of her will; namely, *George Sargon* and *Sarah*, his wife, who was also the heiress at law of the testatrix, *George Fuller*, *John Henry Padbury*, and *Edward Ives Fuller*, against other residuary legatees, and against other parties interested under the will of the testatrix.

On

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On the first point, it was contended for Mr. and Mrs. *Sargon*, that it was the clear intention of the testatrix that the furniture and effects should pass, together with the copyhold house in which she resided, to Mrs. *Sargon;* and that, as to those effects of which the consumption was inseparable from the enjoyment, such as the wines in the cellar of the house, she was absolutely entitled to them: *Randall* v. *Russell.* (*a*) The trustees were directed, after the decease of *Sarah Sargon* and her husband, to sell and dispose of "the said hereditaments and premises, or such part thereof over which no appointment had been made," for the benefit of the residuary legatees. The word "premises" would comprehend all the subjects of the gift to the trustees; and, even if it were conceded that the furniture and wines which were liable to be consumed, and probably would be consumed by the mere enjoyment of the tenant for life, were capable of being given over, the residuary legatees could take only subject to the life-interest of Mrs. *Sargon.*

For the residuary legatees, it was argued that there was no declaration of trust as to the furniture and effects; that the word "hereditaments," of and in which alone the trustees were to stand possessed and interested, was applicable only to the real estate, and that the testatrix must be understood to have used that word in its proper and technical sense; that the word "premises" was only used in that part of the declaration of the trusts which directed the sale of the hereditaments, and that, even if the testatrix had intended to give the furniture and effects together with the copyhold messuage to Mrs. *Sargon* for her life, with a power of appointment, and had omitted to include them in the declaration of trust,

(*a*) 3 *Mer.* 195.

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trust, that was an omission which, in the absence of any positive indication of such an intention, and in contradiction to the express language of the will, it was impossible for the Court, upon mere conjecture, to supply.

Upon the second point it was argued, for Mrs. *Sargon*, as heiress at law of the testatrix, and for the residuary legatees, that the devise of the freehold premises in *Little Queen Street*, and of the leasehold premises in *Maiden Lane*, was void upon two grounds; first, that it was an imperfect devise, amounting only to a declaration of intention to be completed by a future testamentary act, unaccompanied by the formalities required by the statute of frauds; secondly, that, even if that objection did not apply, it was void for uncertainty, the objects of the devise not being sufficiently defined. In support of the first objection *Habergham* v. *Vincent* (*a*), *Rose* v. *Cunynghame* (*b*), and *Whytall* v. *Kay* (*c*) were cited. In *Habergham* v. *Vincent* the testator devised freehold estates to trustees to such uses as he should declare by any deed executed in the presence of two witnesses; and he did, accordingly, execute a deed, attested by two witnesses, declaring the trusts of this devise. The deed was held to be a testamentary act, and void with respect to the testator's freehold estate, not being executed in conformity with the statute of frauds. In *Rose* v. *Cunynghame* a testator attempted to reserve to himself a power to charge his real estate with legacies given by any testamentary instrument, whether attested or otherwise; and Sir *William Grant* held in this case, that a legacy, charged upon real estate, given by an unattested codicil, was void,

(*a*) 4 *Bro. C. C.* 353. *S. C.* 2 *Ves.* jun. 204.

(*b*) 12 *Ves.* 29.

(*c*) 2 *Mylne & Keen*, 765

void, distinguishing it from a general charge of legacies upon real estate by a will duly attested, in which case it has been determined, though upon a principle which has never been approved, that the charge will include legacies given by an unattested codicil. The distinction taken by Sir *William Grant* in *Rose* v. *Cunynghame* was applied by Sir *John Leach* to the case of *Whytall* v. *Kay*, where a similar attempt was made by the testator. There, as here, the testator attempted to pass an interest in real estate by a declaration to be completed by a future testamentary act, unaccompanied with the formalities required by the statute of frauds. If this devise could be upheld, it would follow, that the testatrix might, by procuring a dissolution of the partnership subsisting at the time of the devise, and constituting a new partnership by an act, in its effect testamentary, make a parol devise of her real estate; or she might, if she had dissolved the subsisting partnership, and declined entering into another, have disposed of her business by auction, making the disponees or highest bidders the devisees of her real estate, and substituting the sanction of the auctioneer's hammer for the solemnities required by the statute of frauds. And this led to the second objection; for, even if the want of the formalities required by the statute were not a conclusive objection to the validity of this devise, the undefined character of the persons who were to take under it, as well as the indefinite nature of their interest, was sufficient to render it void for uncertainty.

On the other side, it was insisted that the uncertainty of the person or persons who were to take under a devise was no objection to its validity, provided such person or persons were so described with reference to some extrinsic fact, as that the subject of the devised could be ascertained by extrinsic evidence at the time

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when the devise was to take effect; *Sandford* v. *Raikes.*(*a*) In the present case, the persons to whom the testatrix had disposed of her business had been ascertained by the Master's report, and there was no uncertainty, therefore, as to the persons in whose favour the devise was intended to take effect. As to the objection to the devise on the ground that the formalities required by the statute of frauds had not been complied with, or might be evaded by it, the cases cited in support of that objection had no application. In those cases the testators either expressly, or by necessary implication, reserved to themselves a power of passing an interest in real estate by a testamentary act, not conforming with the provisions of the statute of frauds. Here the gift of the disponees of the testatrix's business was complete in itself, and was not to take effect, or to be completed by any act of a testamentary nature. It was nothing more than the common case of a gift to a class of persons who should fill a particular character, to be ascertained by some act or event, extrinsic to the will indeed, but in no degree testamentary within the provisions of the statute of frauds. Thus a gift to the person who should be the testator's servants at the time of his decease would be perfectly good, though it would probably depend in a great degree upon the acts of the testator who should fill that character.

On the third point it was not disputed, on the part of those residuary devisees who took no beneficial interest in the testator's freehold messuage in *Little Queen Street*, and leasehold premises in *Maiden Lane*, that *Charles Stubbs* (the same person as *Charles Nolloth Stubbs*) stood, in that respect, in the same situation as themselves, and, if not excluded on any other ground than his supposed interest

(*a*) 1 *Mer.* 653.

interest in those freehold and leasehold messuages, was entitled to an equal share with themselves in the testatrix's residuary estate.

On the fourth point it was contended for Mrs. *Sargon*, that she was entitled absolutely to the benefit of the promissory note. It had been established by many decisions, that a gift, coupled with an intimation of the motive for the gift, or of the purpose to which the donee might apply it, expressed in language not sufficiently imperative or definite to be considered as a testamentary disposition, did not raise a trust. In *Curtis* v. *Rippon* (*a*), the testator gave all his property to his wife, trusting that she would use it for the spiritual and temporal good of herself and children, remembering always the church and poor; and it was held, that the wife took absolutely. In *Sale* v. *Moore* (*b*), it was held that the words "recommending and not doubting," did not raise a trust; and the Vice-Chancellor, in that case, observed that "the first case, which construed words of recommendation into a command, made a will for the testator, and that the current of decisions had of late years been against converting the legatee into a trustee. *Meredith* v. *Heneage* (*c*), which was affirmed upon appeal by the House of Lords, was an authority to the same effect: there the testator gave his estates to his wife in fee, unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father by devising the whole of his estate, to such of his father's heirs as she might think best deserved her preference; and it was held that no trust was created by this devise. In these cases the expressions of trust, recommendation, confidence,

(*a*) 5 *Mad.* 434.
(*b*) 1 *Sim.* 540.
(*c*) 1 *Sim.* 542.

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confidence, were much stronger than the words in the present case, the gift being to "Mrs. *Sargon* for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present either branch of her family any portion of the principal and interest as she might consider most prudent." In the concluding sentence of the letter, which must be considered as explanatory of any ambiguity in the previous part of it, the words were "to enable Mrs. *Sargon* to have the sole use and power of the said sum of 2000*l.*, due to me by the inclosed note of hand, I have specially indorsed the same in her favour." In *Benson* v. *Whittam* (*a*), the testator gave his dividends in the bank, subject to the payment of certain annuities, to *A.*, to enable him to assist such of the children of *F.* as he should find deserving of encouragement; and it was held that no trust was created for the children of *F.*, but that *A.* took absolutely. In the present case, also, the note being specially indorsed, the legal interest passed to Mrs. *Sargon*.

For the residuary legatees, it was insisted that the words of the letter clearly raised a trust for some branch of Mrs. *Sargon*'s family, and that the objects of the trust were not sufficiently defined to enable the Court to execute it. If the effect of the indorsement was, as it was contended, to pass the legal as well as the beneficial interest in the note to Mrs. *Sargon*, her husband would be entitled to the benefit of it; but Mrs. *Ives* had expressly given it to her for "her sole use and benefit, independent of her husband." The power, given to Mrs. *Sargon* to dispose of it by deed or will, was wholly inconsistent with an intention to give her the absolute interest. The words "sole use and benefit" were controlled

(*a*) 5 *Sim.* 22.

trolled by the subsequent expression, which gave her a discretionary power, either to give the note or any part of the principal or interest to the undefined objects mentioned in the letter, or to dispose of it by deed or will in favour of the same objects.

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Mr. *Spence* and Mr. *Walker*, for the Plaintiffs.

Sir *Charles Wetherell* and Mr. *Kindersley*, for Mr. and Mrs. *Sargon*.

Mr. *Tinney*, Mr. *Temple*, Mr. *Rogers*, Mr. *Lovat*, Mr. *Stinton*, Mr. *Parker*, Mr. *Tamlyn*, Mr. *Griffith Richards*, Mr. *Teed*, Mr. *W. C. L. Keene*, Mr. *James Russell*, and Mr. *Bethell*, for the other Defendants.

The MASTER *of the* ROLLS. *Aug. 7.*

In this case, certain questions arising upon the construction of the will of *Elizabeth Ives*, and a question upon the right to a sum of 2000*l.* due from Messrs. *Fuller* upon a promissory note, dated the 15th of *October* 1827, were reserved at the hearing.

The first question is, what, if any, beneficial interest in the furniture and effects of the testatrix in the house, where she principally resided, passed to the Defendant Mrs. *Sargon*, under the first clause in the will; and I think that no such beneficial interest did pass.

The testatrix, although she gave the house, and the furniture and effects therein, and certain cottages, to her trustees on trust, has omitted, in the statement of the trusts, to take any notice of the furniture and effects, and has employed words which appear to me to be only applicable to the real estate comprised in the devise;

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and I am, therefore, of opinion, that the legacy of the furniture and effects does not take effect, because there is no trust declared of them.

The next question under the will is, whether the ultimate gift of the freehold and leasehold property on which the business of the testatrix was carried on is void under the statute of frauds, or for uncertainty, as to either the freehold or leasehold comprised therein.

The testatrix, Mrs. *Ives*, at the date of her will, carried on the trade of a varnish and colour maker in co-partnership with *John Dialls Innell*, *Charles Nolloth Stubbs*, *Samuel Silver*, and *Thomas Cookes*. She was entitled to the property on which the business was carried on, and to the capital engaged in it. She was interested in the profit and loss to the amount of three fourths of the whole, her partners being interested in the remaining fourth, in equal shares, and by her will she devised as follows. (His Lordship read the devise.)

The question arises upon the last clause, "and from and after her decease," [the decease of the testatrix's sister *Mary Innell*,] "in trust to dispose and divide the same unto and amongst my partners, who shall be in co-partnership with me at the time of my decease, or to whom I may have disposed of my business, in such shares and proportions as my trustees shall think fit or deem advisable;" and it is objected to this devise, —

First, that it is imperfect, as not designating the devisees, and leaving them to be constituted afterwards by some act of the testatrix herself, requiring none of the solemnities rendered necessary by the statute of

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of frauds. The devisees, according to the words, were to be the partners of the testatrix at the time of her decease, or the persons to whom she might have disposed of her business; and as persons might be such partners or disponees by acts of the testatrix, done without formality, it was argued that the devise was void. I think that this objection cannot be sustained; a man, though not married when he makes his will, may devise to such persons as shall be his children at the time of his death. And if the description be such as to distinguish the devisee from every other person, it seems sufficient without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property, and I think that a devise to such person as may be the testator's partners or the disponees of his business may be good.

The other objection is, that, even if such a devise may be sustained, as not infringing the provisions of the statute of frauds, the devise is void for uncertainty; and for the purpose of considering this objection, we must look at the facts. The will was dated the 11th of *September* 1832, and the Master by his report finds, "That after the death of the said *John Dialls Innell*, which happened on or about the 6th day of *February* 1833, and up to the 1st day *April* 1833, the trade or business of a varnish or colour maker hereinbefore mentioned, was carried on by the testatrix in partnership with the Defendants, *Charles Nolloth Stubbs*, *Samuel Silver*, and *Thomas Cookes*, in the shares and proportions, and under the circumstances, and in manner hereinbefore mentioned. And that, at the date of the testatrix's will in the pleadings mentioned, namely, on

or

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or before the 11th day of *September* 1832, and to the time of the death of the said *John Dialls Innell* hereinbefore mentioned, he, the said *John Dialls Innell*, was a partner, and jointly entitled to or interested in the said trade or business with the said testatrix, and the said *Charles Nolloth Stubbs*, *Samuel Silver*, and *Thomas Cookes*, in the same proportionate share as the three last-named Defendants; and that, on and from the 1st day of *April* 1833, when the said partnership between the testatrix and the said *Charles Nolloth Stubbs*, *Samuel Silver*, and *Thomas Cookes* was dissolved, as hereinbefore mentioned, and up to the time of the decease of the testatrix, the said trade or business was continued and carried on by or in the names of the said Defendants, *Samuel Silver* and *Thomas Cookes*, and the said *Ann Abigail Innell* and *John Ives*, in partnership together; and that such last-named parties were, from the 1st day of *April* 1833, interested therein in equal shares and proportions; and that, on the 1st day of *April* 1833, or between that time and the 17th day of *April* 1833, (the day of the death of the testatrix,) she, the testatrix, in manner and under the circumstances hereinbefore mentioned, disposed of the said trade or business, or of her share or interest therein, to or in favour of the said *Samuel Silver*, *Thomas Cookes*, *Ann Abigail Innell*, and *John Ives*; and that the said *Samuel Silver*, *Thomas Cookes*, *Ann Abigail Innell*, and *John Ives* were, from the 1st day of *April* 1833, and up to the time of the death of the testatrix, entitled to and interested in the capital and stock employed in such trade or business, and in the debts belonging, due, or owing thereto, accrued on and subsequently to the 1st day of *April* 1833, except so far as the said *Samuel Silver*, *Thomas Cookes*, *Ann Abigail Innell*, and *John Ives* became accounting parties as debtors to the testatrix, or her estate, in respect of such part of the stock in trade of the then late

late partnership or of the testatrix, as the last-named parties possessed or retained beyond the amount or value of 1000*l.* as hereinbefore mentioned."

The result is, that the testatrix had no partners in her business at the time of her death; but that, at that time, she had disposed of her business, and the persons, to whom she had disposed of it, were *Samuel Silver*, *Thomas Cookes*, *Ann Abigail Innell*, and *John Ives*. And I think that these are the persons amongst whom the trustees are to divide the property in such shares as they may deem advisable.

The third and last remaining question under the will is, whether *Charles Nolloth Stubbs*, one of her nephews, is to have one sixteenth, or only half of one sixteenth share of the residuary personal estate. By her will, the testatrix expresses herself as follows: — "I give and bequeath all my ready money and securities for money, goods, chattels, personal estate, and effects, whatsoever and wheresoever, not hereinbefore specifically or otherwise disposed of, unto the said executors and executrix, their executors, administrators, and assigns, upon trust with all convenient speed after my decease, as to the said executors and executrix, or the survivor of them, or the executors, administrators, and assigns of such survivor shall seem proper or most advantageous, to sell, dispose of, collect, recover, receive, get in, and convert the whole thereof into ready money; and out of the monies arising from such sale, receipt, and conversion, to pay all my just debts and the expense of proving this my will and legacies, and sums hereinbefore bequeathed, and to stand possessed of and interested in the residue or surplus of the monies arising from such sale, receipt, and conversion as hereinbefore mentioned, and which shall remain after, and not be applied for any of the purposes

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purposes aforesaid, in trust for such of the children of my two brothers, *John Stubbs*, deceased, and *Robert Stubbs*, deceased, and my said sister *Mary Innell*, (other than and except my nephew *John Stubbs*, the son of my said brother *John Stubbs*, deceased, and except *George Stubbs* and *Robert Stubbs*, sons of my brother *Robert Stubbs*, deceased,) and the children of my said nephews, *John Stubbs*, *George Stubbs*, and *Robert Stubbs*, as shall be living at the time of my decease, and the issue of such of the same children, including the issue of the said *John Stubbs* and *George Stubbs*, as shall be then dead, or as to the issue of my said nephews *John Stubbs* and *George Stubbs*, as if my said nephews had not been personally excluded, but were then respectively deceased, and for their respective executors, administrators, and assigns, to be divided between them, if more than one, so and in such manner as that they may take their respective shares as tenants in common, except as to my nephew, the said *John Dialls Innell*, and *Charles Stubbs*, and *Caroline Ade* the wife of *Samuel Silver*, and *Sarah Cookes*, the wife of *Thomas Cookes*, and such of my nephews as may be entitled to any beneficial estate or interest in my said freehold messuage or tenement in *Queen Street*, *Lincoln Inn Fields*, and leasehold premises in *Maiden Lane*, under the devise thereof, hereinbefore contained, whose shares in such residuary personal estate I direct to be one half of the amount of the shares of my other nephews and nieces." *Charles Nolloth Stubbs* is, by the name of *Charles Stubbs*, excluded from more than one half of the shares of other nephews and nieces; but the words of the testatrix are such as to shew, that she intended to exlude only those who took beneficial interests in the freehold and leasehold property in *Queen Street* and *Maiden Lane*. *Charles* was not one of those, and it appears to me that this is a case in which, to give effect to the plain intention, the word

word "and" may be read as "or" in the exception; and if this be done, *Charles* will be entitled to one sixteenth.

The last question in the cause relates to the 2000*l.*, payable on the promissory note of Messrs. *Fuller*.

[His Lordship stated the facts as to the promissory note, and read the letter dated the 7th of *September*, 1832.]

Upon the construction of this letter, I am of opinion that the promissory note was not indorsed and delivered to Mrs. *Sargon*, as a free gift for her own personal use, but for the purpose of the money, secured by it, being disposed of by Mrs. *Sargon* to such parts or members of the testatrix's family as were intended to be thereby designated.

Unfortunately the letter is so expressed, that the objects cannot, from the words of it, be ascertained; and thinking the trust too indefinite for the Court to act upon, I am of opinion that the 2000*l.* must be treated as part of the testatrix's personal estate.

This decision was appealed from on the first, second, and fourth points, and affirmed, upon each of those points, by the Lord Chancellor.

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March 20, 21.

HARCOURT *v.* MORGAN.

A testator gave to *W. H.* and *M. H.* the amount of the bond he held for 1000*l.*; when they got the principal money paid to them, they then to give their uncle *J. B.* the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond:

Held, that *W. H.* and *M. H.* were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal.

CHARLES HARCOURT, by his will, dated the 30th of *April* 1829, gave and bequeathed to his friends, Sir *John Carr*, and *James Morgan*, their executors, administrators, and assigns, all his leasehold and personal property, bonds, bills, goods, and chattels, to hold the same upon trust to pay, out of the rents of the leasehold premises, the annuities in the will mentioned; and upon trust to pay the remainder of the rents, interest, dividends, and produce of the trust funds, towards the maintenance and education of his son, *Charles Harcourt*, till he should attain the age of twenty-five years; and upon his attaining the age of twenty-five years, to pay, assign, and transfer, all the leasehold and personal property, subject to the said annuities, to his son, *Charles Harcourt*, his executors, administrators, and assigns. And the testator appointed Sir *John Carr* and *James Morgan*, his executors.

By a codicil, dated on the same day as the will, the testator, after giving certain annuities and specific legacies, proceeded as follows: — "I give and bequeath to my good friends, *William Hall* and his sister *Martha Hall*, in equal shares, the amount of the bond I hold from Sir *James Hoare*, Bart., for 1000*l.* (the bond is now in the hands of Messrs. *Jones*, *Lloyd*, and Co., *Lothbury*), when they get the principal money paid to them, they then to give their uncle, Mr. *John Burt*, the sum of 50*l.*, and also their father and mother 50*l.* each, arising from the bond of Sir *Joseph Hoare*, Bart.; all that remains after the above sums are paid, in the event of the decease of my son, *Charles Harcourt*, before he attains

attains the age of twenty-five years, I give to my executors, and the daughters of *George Oakley*, to be divided equally between them.

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The question was, whether, under the bequest of the amount of the bond given by the codicil, the legatees were entitled to the interest which had accrued due in the testator's lifetime upon the bond, as well as to the principal; and the case stood over for the purpose of affording an opportunity to counsel to produce authorities upon the point.

Mr. *Kindersley*, on the following day, mentioned *Roberts* v. *Kuffin* (*a*), where Lord *Hardwicke* held that a gift of 200*l.*, secured by a mortgage, passed the principal only; and observed that if a man gives 300*l.* due upon a bond by his will, this does not carry the interest incurred in the lifetime of the testator, because it is quite doubtful what it might amount to, from the uncertainty the time the testator might live after making his will.

Mr. *Pemberton* cited *Hawley* v. *Cutts* (*b*), where a question was raised upon the following bequest: "I give *A.* 300*l.* in money, which he oweth me upon bond;" and there being an arrear of interest to the amount of 20*l.* at the date of the will, the Court held that *A.* was entitled only to the principal; but it was at the same time agreed that, if the words had been, "I give *A.* the debt of 300*l.* which he oweth me," that would have carried the interest as an appendant to the debt.

March 21.

The MASTER *of the* ROLLS held that the legatees were entitled to the arrear of interest upon the bond, as well as to the principal.

(*a*) 2 *Atk.* 115. (*b*) 2 *Freem.* 23.

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Feb. 1, 2.
March 26.

M'DONALD *v.* BRYCE.

A testator gave the residue of his property to *R. S.*, the eldest son of *P. S.*; and failing him, to the next and other sons in succession of *P. S.*; and, failing the male children of *P. S.*, to the legatees named in the residuary clause. And he directed his executors to apply the dividends of of his residuary property to the maintenance of *R. S.* during his minority, and of the other sons in succession of *P. S.* in case of the death of *R. S.* before attaining the age of twenty-one.

R. S. survived the testator, and died an infant, and *P. S.*, who was far advanced in years, had no other son.

The period allowed by the statute for the accumulation of the income of the residue having expired, it was held that the next of kin, and not the residuary legatees, were entitled to the income of the residue, until the contingency upon which the residue was given, either to a male child of *P. S.* or to the legatees named in the residuary clause, should be determined.

ROBERT SHAWE, by his will, dated the 20th of *March* 1802, after giving legacies to the daughters of *Lewis M'Pherson* therein named, disposed of the residue of his property, which consisted wholly of personalty, in the following words: — "The residue of my property I will and bequeath unto *Robert Shawe*, the eldest son of the aforementioned *Peter Shawe*, for his sole use and benefit, upon the said *Robert Shawe* his coming of age; failing him, to the next male child, procreate of the body of the aforesaid *Peter Shawe*, and lawfully begotten, who shall attain the age of twenty-one years; failing the male children of the said *Peter Shawe*, lawfully begotten, to the aforementioned legatees and the survivors and survivor of them in equal proportions, viz., Misses *Ann*, *Margaret*, and *Elizabeth M'Pherson*, and Mrs. *Christy Grant*, Mrs. *Isabella M'Donald*, Mrs. *Mary M'Donald*, and Mrs. *Anny M'Lean*, all daughters of the aforementioned *Lewis M'Pherson*, Esq., of *Dalraddy*, *North Britain*; their respective shares to be at their free will and disposal. And whereas the aforesaid *Robert Shawe*, the residuary legatee named by this will, is now under age, I do constitute and appoint my executors *Francis Duncan* and *Alexander Bryce*, and the survivor of them, guardians and guardian of the said child during his minority; and my will is and I do

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I do hereby direct that they do apply the dividends arising from the property belonging to me, which may remain after paying the different legacies and setting apart a sufficient sum for the payment of the annuities hereinbefore bequeathed with my funeral expenses (my debts being all paid), to the maintenance, education, and benefit of the said child, as they shall judge most advantageous for him; and, in the event of his death before his reaching the age of twenty-one years, I do also constitute and appoint the said *Francis Duncan* and *Alexander Bryce*, and the survivors of them, to be guardians and guardian to the male child lawfully begotten of the aforesaid *Peter Shawe*, who may succeed according to the before-recited disposition in this my said last will and testament, with power to the said *Francis Duncan* and *Alexander Bryce*, and survivors of them, or guardians and guardian, to apply the dividends aforesaid to the purposes above-mentioned."

The testator died on the 11th of *April* 1812, leaving the Plaintiffs *Isabella M'Donald*, *Ann M'Lean*, *Ann M'Pherson*, *Margaret M'Pherson*, *Elizabeth Anderson* (in the will named *Elizabeth M'Pherson*, spinster), together with *Christy Grant* and *Mary M'Donald*, all daughters of *Lewis M'Pherson*, named in the residuary clause, surviving him; and his will was proved by *Alexander Bryce* alone, *Francis Duncan*, the other executor, having renounced probate thereof.

Robert Shawe, the son of *Peter Shawe*, in the will named, died in the month of *August* 1814, being then an infant of the age of nine years. *Peter Shawe* had no other child, and both he and his wife were of a very advanced age.

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The bill was filed by the Plaintiffs against the executor, and the respective personal representatives of *Christy Grant* and *Mary M'Donald*, who both survived the testator; and it prayed that the residue of the personal estate of the testator and of the accumulations thereof might be ascertained and declared; and that it might be declared, that in default of any male issue of *Peter Shawe* lawfully begotten, who should live to attain the age of twenty-one years, the Plaintiffs, as the surviving legatees of the residue, were entitled thereto in equal shares, and that, in the meantime, and until any male child of *Peter Shawe* should be born, the Plaintiffs were entitled to have the dividends, interest, and produce of the residue paid and applied to their use and benefit. And that, as soon as it should be ascertained that there could be no person entitled to the residue, as a male child of *Peter Shawe*, lawfully begotten, the whole of the residue, and the accumulations thereof, might be paid to and divided among the Plaintiffs in equal shares.

The next of kin of the testator living at his death, or their representatives, were brought before the Court by a supplemental bill.

The question in the cause was, whether the income of the testator's residuary estate, and of the accumulations, from the time at which accumulation was made void by the statute until the contingency should be determined, belonged to the legatees named in the residuary clause, or to the next of kin.

Mr. *Pemberton* and Mr. *Stuart* for the Plaintiffs.

The testator has created, or attempted to create a trust for accumulation, until the contingent event shall happen on which the testator's residuary property is to go,

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go, either to a male child of *Peter Shawe*, or to the legatees named in the residuary clause; and the question is, to whom the income of that residuary property belongs, from the period at which the trust for accumulation is made void by the statute of 39 & 40 *G.* 3. *c.* 98. The statute prevents an accumulation of interest during the minority of an unborn child, and the excess of accumulation, prohibited by the statute, forms part of the residue: *Haley* v. *Bannister*. (*a*) The next of kin claim upon the supposition that the statute has made the residuary gift void; but all that the statute has done, is to make the trust for accumulation void for the excess, and not the residuary gift. The residuary gift subsists after the trust for accumulation ceases; and the statute provides that the income shall go to those persons who would have been entitled to receive it, if there had been no trust for accumulation. The law has said, that accumulation shall cease after the lapse of twenty-one years from the death of the testator, and that the residuary legatees shall not take the income after that time in the form of accumulation; but it leaves the residuary gift untouched, and the residuary legatees are the persons to whom the income would go, if the trust for accumulation were struck out, as the statute requires. In this case, the gift is to a son of *Peter Shawe*, who shall live to attain twenty-one, and failing male children of *Peter Shawe*, to the legatees named in the residuary clause, and the survivors and survivor of them. By the bill, the Plaintiffs claim an interest as the surviving legatees, exclusive of the representatives of the two deceased sisters; but it must be admitted that words of survivorship, combined with words importing a tenancy in common, must be referred to the death of the testator, and that the representatives of the two legatees who

(*a*) 4 *Mad.* 275.

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who survived the testator are equally entitled with the Plaintiffs: *Belk* v. *Slack*. (*a*) A bequest to *A. B.*, and, if *A. B.* die under twenty-one, to a person not in *esse* who shall live to attain twenty-one, and in default of such person to *C. D.*, gives a vested remainder to *C. D.* In the present case, the vested remainder is liable to be devested by the possibility of a son of *Peter Shawe* coming into *esse*; but the possibility does not make the remainder the less a vested interest until, if ever, it shall be defeated. The right of the Plaintiffs to receive the income of the residue, and of its lawful accumulations, may be devested by the birth of a son of *Peter Shawe*, though, considering the age of *Peter Shawe*, that is a very remote possibility; but, until it shall be so devested, it is an immediate vested interest.

Mr. *Mylne* for the Defendants, the representatives of the deceased residuary legatees.

Mr. *Tinney*, Mr. *Lovat*, Mr. *Romilly*, and Mr. *Koe*, for the next of kin.

If the argument on the other side were to prevail, the statute would have no operation; and not only would the statute have no operation as against the testator's disposition of the residue under which an excessive trust for accumulation is implied, but the legatees named in the residuary clause would be held to take an immediate interest in possession, whereas the clause itself gives them nothing except upon a contingency, which may never happen. Had the *Thelluson* Act never passed, the ultimate disposition of the income of the residue, and of its accumulations beyond the twenty-one years, must have continued in abeyance, like the accumulated income for the twenty-one years, and the whole would have gone either to

(*a*) 1 *Keen*, 238.

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to a son of *Peter Shawe*, or to the Plaintiffs, upon the death of *Peter Shawe* without male issue. The act has declared that the surplus accumulation is unlawful, and that the income from the period at which accumulation must cease, until the contingent event shall be determined, shall go to the persons who would have been entitled to receive it, if no accumulation had been directed or implied. There is in this will no express direction for an unlawful accumulation; but it is sufficient that there is a direction which was capable, in certain events, of exceeding the limits prescribed by the statute, and which has, in the event that has actually happened, exceeded those limits; *Shaw* v. *Rhodes*. (*a*) If a bequest of personal estate, followed by a gift of the residue, fails, it sinks into the residue, and the residuary legatee has the benefit of the failure. That was the case in *Haley* v. *Bannister*. Here the Plaintiffs do not pretend to claim except under the residuary clause. Now if the gift of a residue fails altogether, it can only go to the next of kin; and if the gift of a residue fail in part, it is to that extent undisposed of, and the next of kin have the benefit of the partial failure, it being settled by the authorities that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining part as a residue of residue; but, instead of resuming the nature of residue, devolves, as undisposed of, to the next of kin: *Skrymsher* v. *Northcote* (*b*), *Leake* v. *Robinson*. (*c*) To say that the legatees named in the residuary clause are entitled to the immediate receipt of the income, is to say that the implied direction for accumulation beyond the time allowed by the statute is at the same time void and not void. We admit that the Plaintiffs take a vested interest for the purpose of transmission

(*a*) 1 *Mylne & Craig*, 135.
(*b*) 1 *Swanst*. 566.
(*c*) 2 *Mer*. 363.

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transmission to their representatives, if *Peter Shawe* should die without leaving a son, but not for the purpose of immediate enjoyment. The residuary gift, supposing it to be unaffected by the statute, would give the Plaintiffs no interest for the purpose of enjoyment, until the contingency is determined. How, then, can it be contended that the statute, which makes the residuary gift void for the excess, has the effect of placing the Plaintiffs in a better situation than they would have been had it left the gift untouched, and of giving them a vested interest for the purpose of immediate enjoyment? In *Griffiths* v. *Vere* (*a*), Lord *Eldon* comments at considerable length upon the *Thelluson* Act; and observes, that "if a testator directed, what the act authorises him to direct, that for the first twenty-one years after his death there should be accumulation, at the end of that time there might be a very long period during which the rents and profits would go to no one by the disposition, but in the case of real estate would belong to the heir; and in the case of personal estate, unless there was an express disposition of what was not before disposed of, to the next of kin."

Mr. *Spurrier*, for the executor.

Mr. *Pemberton*, in reply.

March 26.

The Master *of the* Rolls (after stating the facts).

As the gift to the daughters of *Lewis M'Pherson* was made contingent upon the failure of male children of *Peter Shawe*, and *Peter Shawe* is still living, and may have sons, it has been considered that the income of the residue

(*a*) 9 *Ves.* 132.

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residue of the testator's estate ought to be accumulated for the benefit either of a male child of *Peter Shawe*, if he should come into *esse*, or of the daughters of *Lewis M'Pherson*, if *Peter Shawe* should die without having a son. And accordingly such accumulation is stated to have been made as long as the statute of 39 & 40 *G.* 3. *c.* 98. would permit; and, the period of accumulation allowed by the statute having expired, the question is to whom the income of the residue of the testator's estate, and of the accumulations thereof lawfully made, is to be paid, until it shall appear that *Peter Shawe* has not a son to take the residue with those accumulations which, if there be no such son, will clearly belong to the daughters of *Lewis M'Pherson.*

Now the statute which forbids any one to dispose of property by will, so that the income thereof may accumulate for more than twenty-one years from the death of the testator, provides, that in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be void, and the "profits and produce of the property, directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of the act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

The Plaintiffs in this cause are four of the daughters of *Lewis M'Pherson;* and they, together with some of the Defendants in the same interest, contend that, until the contingency shall be determined, the income of the residue, and of its lawful accumulations, belongs to them. The gift to the daughters of *Lewis M'Pherson* is, indeed, a contingent executory bequest, and may be defeated by a son of *Peter Shawe;* yet it is a right which

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vested in them, so as to be transmissible to their representatives; and that right is only prevented from being an absolute interest by the possibility of a son of *Peter Shawe* coming into *esse*. It is only with reference to this possibility that a direction to accumulate is in this case implied. If there were no such possibility, there would not only be no implication of a direction to accumulate, but the daughters of *Lewis M'Pherson* would be entitled to the immediate enjoyment. And it is argued that, the implied direction to accumulate being rendered void by the statute, the law gives the enjoyment to the legatee whose right is vested, though subject to be devested by a subsequent event; and that with this the statute concurs in giving the income to the persons who would have been entitled to it, if there had been no accumulation directed.

It is true that, if there be a gift of a legacy for life, with a contingent executory bequest over, the contingent gift over is held to vest in right, though it does not in possession. *Barnes* v. *Allen* (*a*). It is true, also, that, where there is an immediate gift of a legacy, with a gift over if the legatee die under twenty-one, the first legatee, taking an immediate vested interest, though subject to be devested, is entitled to the income until the event, upon which the devesting is to happen, shall take place. *Deane* v. *Test.* (*b*) But in this case it is only upon the failure of male issue of *Peter Shawe* that any thing is given to the daughters of *Lewis M'Pherson;* and, until that event happens, they can take nothing in possession, though they may have a vested right to a contingent interest, and that right may be transmissible to their representatives.

In

(*a*) 1 *Bro. C. C.* 181. (*b*) 9 *Ves.* 146.

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In the present state of things nothing is given for immediate enjoyment. The income of the residue, and of its lawful accumulations, is not given by the will at all, if not given by the residuary clause; and, if given by the residuary clause, is made void by the statute, and so becomes a portion of the residue, undisposed of by the will, and, under these circumstances, it appears to me that it belongs to the next of kin.

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By a marriage settlement, the property of the intended wife was vested in trustees, on trust, as to the real estate, to pay the rents to the intended wife for her life, and, after her decease, to pay the same to *R. S.*, the intended husband, until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of any act for the relief of insolvent debtors, or he should sell, aliene, charge, or incumber the rents and profits by way of anticipation, or attempt or agree so to do, or should die, whichever of the said events should first happen, and from and after the happening of any one of the said events, upon trust for the children of the marriage; and in default of issue of the marriage, or of issue of the intended wife, over.

The marriage took effect, and there was no issue of the marriage. The husband, *R. S.*, survived his wife, and made several attempts in his lifetime to raise money by sale or mortgage of the property comprised in the settlement, but was prevented from effecting such sale or charge by reason of the language of the settlement:

Held, that a person, entitled to an interest in property, subject to such a limitation over, may make inquiries, and take advice whether he can sell or not, and do acts indicative of his wishes on the subject, without giving effect to the limitation over.

UNDER several deeds, which were set forth in the pleadings, the real and personal property therein comprised was vested in trustees, in trust for *Samuel Purefoy Harper*, for his life, with remainder to *Elizabeth Harper*, who survived *Samuel Purefoy Harper*, for her life, with remainder to her two daughters, *Mary Jones* and *Louisa Jacques Purefoy Harper*, in such manner as she should appoint; and, in default of appointment, equally between them.

A marriage being in contemplation between *Louisa Purefoy Jacques Harper* and *Robert Trasler Scarborough*, *Elizabeth*

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Elizabeth Harper appointed an equal undivided half of the trust estate to her absolutely; and thereupon a settlement of that moiety was made by indentures, dated the 4th and 5th days of *September* 1824, and made between *Robert Trasler Scarborough* of the first part, *Louisa Purefoy Jacques Harper* of the second part, and *Henry Richard Harper* and *William Wyse* of the third part; and thereby the trust property was vested in trustees, on trust, as to the real estate, to pay the rents to *Louisa* for her life, and, after her death, to pay the same to *Robert Trasler Scarborough*, until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of any act or acts for the relief of insolvent debtors, or he should sell, aliene, and charge, or incumber the said rents or profits, or any part thereof, by way of anticipation, or attempt or agree so to do, or should die, whichever of the said events should first happen; and from and after the happening of any one of the said events, and the failure or determination of the trust before declared for *Louisa*, upon trust for the benefit of the children of the marriage; and, in default of such issue, in trust for *Louisa* and the heirs of her body; and, in default of such issue, in trust for the children of *Mary Jones;* and there was a corresponding trust as to such part of the trust fund as consisted of personal estate.

The marriage took effect, and there was no issue of the marriage; and *Louisa Purefoy Jacques Scarborough* died in the month of *December* 1826, leaving her husband surviving her. *Elizabeth Harper*, the tenant for life, died in *March* 1832.

The bill was filed by *William Jones* and *Mary* his wife, and the children of *Mary Jones*, against *William Wyse*, *Robert Bucknell*, and *Robert Trasler Scarborough*. It charged that the Defendant, *Robert Trasler Scarborough*,

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borough, had become, and was insolvent, and was insolvent in the lifetime of *Elizabeth Harper;* and that, in her lifetime, he attempted to sell his reversionary interest in the trust property, by way of anticipation; and that, by reason thereof, he committed a forfeiture, and the trusts, by the settlement declared in his favour, ceased and determined. And the bill, after charging several particular facts in support or by way of evidence of the general charge, prayed that the trusts of a settlement, dated the 4th of *May* 1813, might be performed, regard being had to an appointment, made by *Elizabeth Harper*, of one moiety of the property therein comprised, in favour of *Louisa Purefoy Jacques Harper*, afterwards *Scarborough*, by an indenture, dated the 5th day of *September* 1824, and to an appointment, made by *Elizabeth Harper*, of the other moiety of the property in favour of the Plaintiff *Mary Jones;* and to the settlement of the last-mentioned moiety, by an indenture dated the 11th of *March* 1826: and that the trusts of the indentures of the 5th of *September* 1824, and of the 11th of *March* 1826, might be performed; and that accounts of the trust property, and of the income thereof, might be taken; and that the moiety appointed to *Mary Jones*, and settled by the indenture of the 11th of *March* 1826, might be properly secured. And that, as to the one half settled by the indenture of the 5th of *September* 1824, it might be declared that, by reason of the Defendant *Robert Trasler Scarborough* having become insolvent, as also by his having attempted to sell his interest in the trust property under the trust of the last-mentioned indenture, the trusts thereby declared in favour of *Robert Trasler Scarborough* ceased and determined in the lifetime of *Elizabeth Harper;* and that, in carrying the trusts of the indenture into execution, regard might be had to that declaration; and that such of the Plaintiffs, the children of *Mary Jones* who had attained

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attained twenty-one years of age, might be declared to be absolutely entitled, each of them, to one seventh share of the property comprised in the settlement, and the income thereof since the death of *Elizabeth Harper*, and for consequential relief.

The Defendant *Scarborough* admitted that he was arrested for debt, and was imprisoned in the *Fleet* from *May* 1830 to *March* 1831; and that several of his creditors executed a letter of license, dated the 23d day of *December* 1831; but he denied that he was ever insolvent, or that he ever compounded with his creditors, or that he ever attempted to sell or incumber his interest in the trust property.

The Plaintiffs examined witnesses, and produced several letters; and, from the evidence, it appeared that the Defendant *Scarborough* did endeavour to raise money by sale or mortgage of his interest in the trust property, and was prevented from doing so only by the terms in which the settlement was expressed; and that he never executed any instrument purporting to be a sale or charge, or an agreement to sell or charge the property, because the persons with whom he treated, having become acquainted with the terms of the settlement, refused to proceed in the treaty for the sale or charge.

Mr. *Spence* and Mr. *Geldart*, for the Plaintiffs, insisted that the Defendant *Scarborough*, by attempting to sell his reversionary interest in the trust property in the lifetime of *Elizabeth Harper*, committed a forfeiture, which, in the events which had happened, gave effect to the limitation over in favour of the Plaintiffs: *Stephens* v. *James*. (*a*) If the Court should be of opinion that the attempt

(*a*) 4 *Sim.* 499.

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attempt to sell or charge his interest in the trust property was not sufficient to constitute a forfeiture, there was abundant evidence of his insolvency. His inability to satisfy the just demands of his creditors; the expedients to which he resorted for the purpose of raising money; his lying in prison in the years 1830 and 1831, and the letter of license which he obtained from his creditors in the month of *December* in that year, were circumstances which shewed that he was in a situation of great difficulty and embarrassment, and insolvent within the meaning of the language of this settlement, and within the authorities in which the question of insolvency had been considered: *Bayly* v. *Schofield* (*a*), *Shears* v. *Rogers* (*b*), *De Tastet* v. *Le Tavernier* (*c*), *Parker* v. *Gossage*. (*d*)

Mr. *Tinney*, for the Defendant *Scarborough*.

Forfeitures are odious in the sight of the law, and will not be enforced unless the strictest and most convincing proof is given of their having been incurred. There are three grounds of defence against the case of forfeiture attempted to be made by this bill. First, no act of the Defendant *Scarborough*, prior to the month of *March* 1832, when the tenant for life died, could create a forfeiture; for the words of the settlement are, "after her decease, in trust for *Robert Trasler Scarborough*, until he should become bankrupt or insolvent; or a commission of bankrupt should issue against him; or he should take the benefit of any act of parliament for the relief of insolvent debtors; or he should sell, aliene, charge, or incumber, or attempt or agree so to do," &c. His interest was to commence at the decease of the tenant for life, and to continue, until he should commit any of the

(*a*) 1 *M. & S.* 338.
(*b*) 5 *B. & Ad.* 362.
(*c*) 1 *Keen*, 161.
(*d*) 2 *Crompt. Mees. & Ros.* 617.

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the acts afterwards enumerated. Now, he had done none of the acts so enumerated after the death of Mrs. *Harper;* and indeed almost the whole of the evidence applied to acts done previously to the month of *March* 1832. Secondly, the acts, by which the insolvency of the Defendant is attempted to be proved, amount only to evidence of embarrassment, and fail altogether to shew a case of insolvency within the meaning of the settlement. The letter of license was so far from being a composition with his creditors, that the object and effect of it were merely to give him time to relieve himself from his embarrassment; and it left him as liable as ever to the demands of his creditors, when the period for which it was granted should have expired. Thirdly, a mere attempt to aliene or incumber, not followed by any actual alienation or incumbrance, — an attempt, which has not succeeded, and which is not carried out by any solemn act, such as an assignment of the property, furnishing evidence of the intention, — cannot create a forfeiture, for othewise a mere doubt or desire, on the part of a person entitled to property, subject to such a limitation as the present, might be a cause of forfeiture; and he might be deprived of his property, if he merely took professional advice upon the question whether he could or could not alienate his interest.

Mr. *Pemberton*, for the trustees.

Sir *Anthony Mildmay*'s case (*a*) is an express authority to shew, that a forfeiture cannot be created by a mere attempt to aliene; it is there said that "*non definitur in jure quid sit conatus;* and therefore the rule of law decides, that *non efficit conatus nisi sequitur effectus*, and the law rejects conations as things uncertain which cannot be put in issue." It was held, therefore, that a proviso

(*a*) 6 *Co.* 42. *b.*

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a proviso restraining Sir *Anthony Mildmay* from attempting or going about to aliene the estate vested in him was inoperative. So, in *Pierce* v. *Win* (*a*), where there was a devise to one, and the heirs male of his body, with a proviso that, if he attempted to aliene, his estate should cease, the Court held the condition void; "for *non constat* what shall be judged an attempt, and how could it be tried." *Ware* v. *Cann* (*b*) is an authority to the same effect. The insolvency, provided against in the clause in this settlement, is wholly different from the insolvency of a trader, contemplated by the bankrupt laws. The bankrupt laws were framed upon the foundation, that a trader ought always to be ready to answer all the demands of his creditors; the husband in this case was not a trader, and, if he were ultimately solvent, the object of the settlement, which was to secure a provision for the family, if he should not be able to enjoy the income himself, would be answered. He was therefore at liberty to compound or make arrangements with his creditors, and to procure time for the payment of his debts, in order to avert that state of cirumstances in which the limitation over would take effect.

Mr. *Spence*, in reply.

The MASTER *of the* ROLLS (after stating the facts and the effect of the evidence). *Jan.* 13.

It is argued, on the part of the Plaintiffs, that the conduct of the Defendant amounted to an attempt to sell, or incumber, within the meaning of the settlement, and that, in consequence thereof, the limitation over took effect. In this argument I cannot concur. It appears

(*a*) 1 *Ventr.* 321. (*b*) 10 *B. & C.* 433.

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pears to me, that a man, entitled to such an interest and subject to such a limitation over, may desire to sell, make inquiries, and take advice, whether he can sell or not, and do various acts indicative of his wishes on the subject, without giving effect to the limitation over; and, without saying, that no act less than the signature of an instrument purporting to sell, or to be an agreement to sell, could be an attempt to sell within the meaning of this settlement, I think that the acts done by the Defendant in this case do not amount to such an attempt; and that the Plaintiffs fail in that part of their argument.

Upon the question of insolvency, after a careful perusal of the evidence, I think that it is to some extent, but not conclusively, proved. The evidence consists in some degree of the letters and admissions of the Defendant; and as those letters and admissions are not charged in the bill, the Defendant has had no opportunity of explaining them, if they admit of explanation.

It was argued, for the Defendant, that, whatever evidence of insolvency there might be, it related only to the time previous to the death of Mrs. *Harper;* and that insolvency, previous to the time when the Defendant was to have the actual enjoyment of the property, would not give effect to the limitation over. I think that this argument is not sustained by the language of the settlement; and, if it were, it appears to me that the evidence bears upon a time subsequent to the death of Mrs. *Harper* in *March* 1832.

Considering the state of the evidence, I think it necessary to refer it to the Master to inquire whether the Defendant *Scarborough*, subsequent to his marriage, in the pleadings mentioned, and when, became insolvent, with liberty for the Master to state special circumstances.

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A person domiciled in *England*, who was indebted in money upon bond, died intestate, leaving real estate in *Scotland*, and the bond debts were paid by the heir out of the produce of the real estate in *Scotland*.

Held, that the right of relief or demand against the personal estate, which by the law of *Scotland* is given to the heir who has paid moveable debts, is capable of being made available in *England*, where the personal estate is the primary fund for the payment of all debts.

THIS cause came on upon exceptions to the Master's report, and upon a petition; and the question was, whether the debts of Lady *Mary Ker*, which had been paid by her co-heirs out of real estate in *Scotland*, ought to be repaid to them out of her personal estate, to be administered in *England*.

Lady *Mary Ker*, and her sister Lady *Essex Ker*, as the co-heirs of the Duke of *Roxburghe*, were entitled to certain real estates in *Scotland*. They were domiciled in *England*, contracted debts there, and executed joint and several bonds for securing the payment of such debts.

In *March* 1818, Lady *Mary Ker* died intestate. Her sister, Lady *Essex Ker*, was her heiress at law and administratrix. She entered, as she was entitled to do, on the *Scotch* estates, but did not make up her titles to them according to the forms required by the law of *Scotland*.

In the month of *August* 1819, Lady *Essex Ker* executed a testamentary deed of disposition, by which she intended to dispose of the *Scotch* real estates which had descended to her from Lady *Mary Ker;* but, as she did not make up her titles to those estates, the same were, after her death in *September* 1819, claimed by the co-heirs of Lady *Mary Ker*, the Hon. *Henrietta Bellenden*, *John Bellenden Ker*, and *John Bulteel*, who finally established their title by a decision of the House of Lords.

Lady *Mary* and Lady *Essex Ker* had personal estates in *England*, and, when Lady *Essex Ker* died, there

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were joint and several bonds of Lady *Mary Ker* and Lady *Essex Ker* remaining unpaid.

The will of Lady *Essex Ker* was proved by the late Earl of *Winchelsea*, and Sir *Robert Williams Vaughan*, two of the residuary legatees; and they filed a bill against another residuary legatee, against the Attorney-General as representing charities, and against the co-heirs for the establishment of the will, and the due administration of the estate of Lady *Essex Ker*.

During the pendency of this suit, some of the bond creditors of Lady *Mary* and Lady *Essex Ker* commenced proceedings in *Scotland* to recover payment of their demands against the co-heirs of Lady *Mary Ker*; and thereupon the co-heirs filed their bill against the executors of Lady *Essex Ker*, who had possessed the personal estate of Lady *Mary Ker*, praying an account, and the due administration of that estate, and of the estate of Lady *Essex Ker*, and that the same estates might be applied in discharge of such of the debts of Lady *Mary* and Lady *Essex Ker* as were, by the law of *Scotland*, of the nature of moveable debts, and primarily chargeable, as between real and personal representatives, upon the personal estate, and for relieving the heirs; and that the heirs might have the benefit of the suit instituted by the Earl of *Winchelsea* and Sir *Robert Williams Vaughan*.

The causes were heard together on the 13th of *June* 1825, and by the decree it was directed that the Master should take an account of the personal estate of Lady *Essex Ker*, and of her debts and legacies; and also an account of the personal estate of Lady *Mary Ker* come to the hands of Lady *Essex Ker*, as her administratrix. And the Master was to inquire of what real estates Lady *Essex Ker* died seised, and which of such estates passed

passed by her will or deed of disposition; and whether, by the law of *Scotland*, there was a distinction between heritable and moveable debts, as to the payment out of debtors' real and personal assets; and whether, by the law of *Scotland*, any creditors claiming moveable debts being paid out of debtors' real estate in *Scotland*, or by the heir or person entitled to such real estate, the heir or person entitled to such real estate was entitled to be paid the amount out of the personal estate, regard being had to the domicile of the debtor; and, if he should find such right to exist by the law of *Scotland*, he was to inquire what debts of that nature had been proved against or paid out of the real estates in *Scotland* of Lady *Mary* and Lady *Essex Ker*, or by the heir, or person entitled to the said respective estates in *Scotland*.

In the course of the proceedings by the creditors in *Scotland*, in *August* 1828, being three years after the date of the decree, an agreement was entered into by the heirs of Lady *Mary Ker*, and Sir *Robert Williams Vaughan*, for the sale of the *Scotch* estates, which were accordingly sold; and a sufficient portion of the purchase-money was applied in payment of the joint and several debts, but by such agreement the parties reserved their mutual claims of relief in relation thereto; and in 1833 the heirs commenced an action of relief, in the Court of Session in *Scotland*, against Sir *Robert Williams Vaughan*, the surviving representative of the Ladies *Ker*, and insisted that, by the law of *Scotland*, he was bound to relieve the heirs of Lady *Mary Ker* of her personal debts paid by them, and therefore prayed that he might pay to them one half of the sums which had been paid out of the proceeds of the freehold estates in satisfaction of the joint debts; and, it being objected that the heirs were not entitled to the relief prayed, because Lady

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Mary Ker died domiciled in *England*, the Lord Ordinary, in *February* 1834, directed a case to be submitted for the opinion of *English* counsel, who, upon the case stated, gave their opinion that the *Scotch* heirs were entitled, as against the executor and residuary legatees of the personal estate, to claim for it exoneration from the debts, or indemnity against them to their whole extent, but not so as to disappoint or prejudice any legatee, not being a residuary legatee.

Upon consideration of this opinion, and on the 18th of *June* 1834, the Lord Ordinary found Sir *Robert Williams Vaughan* liable in relief and payment to the heirs as libelled, so far as personal, to the extent of the executory funds of Lady *Mary Ker*, intromitted with by Lady *Essex Ker*, and Sir *Robert Williams Vaughan;* and it afterwards appearing that there was a balance of 1499*l.* 3*s.* 0½ arising from Lady *Mary Ker*'s estate, and that the claims of the heirs against that estate exceeded that sum, the Court of Session, on the 11th of *March* 1835, decreed against Sir *Robert Williams Vaughan* for payment of the whole balance to the heirs.

Before the action for relief in *Scotland* was brought, and in 1827, the opinion of Mr. *George Joseph Bell* was asked upon the questions of *Scotch* law, which were mentioned in the *English* decree; and Mr. *Bell*'s opinion was set forth in the Master's report.

After the termination of the proceedings in *Scotland*, another opinion was obtained from Mr. *Bell*, from the Lord Advocate Mr. *John Murray*, from Mr. *Currie*, and from Mr. *Maitland;* and in conformity with these opinions, the Master found by his separate report, that by the law of *Scotland*, there was a distinction between heritable and moveable debts, as to the payment out of the debtor's real

real and personal estates, and that, by the law of *Scotland*, when creditors claiming moveable debts are paid out of the debtor's real estate in *Scotland*, or by the heir or person entitled to such real estate, the heir, or person entitled to such real estate is entitled to be repaid, regard being had to the domicile of the debtor.

To this report Sir *Robert Williams Vaughan*, the surviving executor, excepted, on the ground that no sufficient evidence was produced to the Master as to the law of *Scotland*, in respect to the matters directed to be inquired into by the decree.

Mr. *Pemberton*, Mr. *Griffith Richards*, Mr. *Hope*, and Mr. *Stuart* in support of the exceptions.

There are three general rules or propositions bearing upon this question, which may be considered as perfectly settled, and not disputed on either side. First, that where a person dies possessed of property situate in different countries and subject to different laws, his personal property shall be administered according to the law of the place of domicile, and his real estate according to the law of the place in which the real estate is situate. Secondly, that, by the law of *Scotland*, there is a distinction between heritable and moveable debts as to the payment out of the debtor's real and personal assets; and that, if the debtor were domiciled in *Scotland*, any creditor claiming moveable debts being paid out of the debtor's real estate in *Scotland*, or by the heir or person entitled to the real estate, the heir or person entitled to the real estate is entitled to be paid the amount out of the personal estate. Thirdly, that, by the law of *Scotland*, all creditors may obtain payment out of either the real or the personal estate of the debtor; but, if the executor has paid heritable debts, he is entitled to relief against

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the heir; and, if the heir has paid moveable debts, he is entitled to relief against the executor: *Bruce* v. *Bruce* (*a*), *Hog* v. *Lashley* (*b*), *Ommanney* v. *Douglas* (*c*), *Bempde* v. *Johnstone* (*d*), *Somerville* v. *Somerville* (*e*), *Ersk. Inst.* *Robertson's Law of Personal Succession.*

The question in this case is whether the heir, who, if he had paid moveable debts in *Scotland*, would, according to the third proposition, be entitled to be exonerated out of the personal estate administered in *Scotland*, is entitled to the same exoneration out of the personal estate administered in *England;* and this is a question of the first impression, the point never having been hitherto directly raised. By the law of *England* the personal estate is the primary, and, as it is sometimes called, the natural fund for the payment of debts; but the distinction between real and personal estate, in the administration of assets, is in reality purely artificial, and has no existence in by far the greater number of countries in Europe; and there is, perhaps, nothing which can bring the artificial nature of the distinction more completely to the test than a case like the present, where a debt which, if it had been satisfied in this country, would have been primarily payable out of the personal estate of the debtor, has in fact been satisfied out of his real estate situate in another country. The liability of one species of property to the payment of debts in priority to another is not founded in reason or natural justice. In reason and equity, considered without reference to municipal law, a man's land and money, his immoveable and moveable property, ought to be equally subject to the satisfaction of his debts. And where the municipal law is silent, as it is in the present case,

(*a*) 6 *Bro. P. C.* 566. *Toml.* ed.
(*b*) *ibid.* 577.
(*c*) cited *ibid.* 550.; and 3 *Ves.* 202.
(*d*) 3 *Ves.* 198.
(*e*) 7 *Ves.* 750.

case, there can be no equity in favour of the foreign heir, who has paid a debt out of the real estate, against the executor who has the administration of the personal estate in this country. The finding of the Master is founded upon the opinions of the *Scotch* lawyers, and all those opinions proceed upon the erroneous assumption that the fact of the debtor being domiciled in *England* is immaterial. Now the whole question turns upon the law of the domicile; for, if Lady *Mary Ker* had been domiciled in *Scotland*, we admit, that the principle laid down in the third proposition, as to which there is no dispute, would have entitled the *Scotch* heir to relief against the executor. But there is no principle either at law or in equity which entitles a *Scotch* heir who has paid a debt out of the real assets in *Scotland*, which were clearly liable, according to the law of *Scotland*, to the payment of that debt, to be exonerated out of the personal estate administered according to the law of this country where the debtor was domiciled.

The authorities, indirectly bearing upon the question raised by these exceptions, tend strongly to shew that the Master has come to an erroneous conclusion. In *Balfour* v. *Scott* (*a*), a person, domiciled in *England*, died intestate, leaving real estate in *Scotland*: the heir was one of the next of kin; and it was objected, on the part of the other next of kin, that he was not entitled to a share of the intestate's personal estate, without conforming to the condition required by the *Scotch* law, which is to collate or bring the real estate into *hotchpot*, so as to form a common subject of division with the personal estate: *Ersk. Inst.* (*b*) It was determined, however, that the *Scotch* law could not be imported into the consideration of a question involving the administration

(*a*) 6 *Bro. P. C.* 550. *Toml.* ed. (*b*) page 701. 5th edit.

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ministration of the personal estate in this country, where the heir claimed as one of the next of kin, and that the heir was entitled to his distributive share of the intestate's personal estate, without complying with the obligation required by the *Scotch* law. In *Drummond* v. *Drummond* (*a*), a person, domiciled in *England*, who had real estate in *Scotland*, granted a heritable bond for securing a debt contracted in *England*. He died intestate, and the heir, who was also one of the next kin, having paid the debt out of the produce of the real estate, it was determined that he was not entitled to exoneration out of the personal estate. In *Brodie* v. *Barry* (*b*), Sir *William Grant*, after stating the cases of *Balfour* v. *Scott* and *Drummond* v. *Drummond*, both of which he argued in the House of Lords, observes, that in *Balfour* v. *Scott* the disability of the heir did not follow him to *England*, and the personal estate was distributed, as if both the domicile and the real estate had been in *England;* and that in *Drummond* v. *Drummond*, the disability to claim exoneration out of the personalty did follow him into *England*, and the personal estate was distributed as if both the domicile and the real estate had been in *Scotland*. In the case before him, where the testator devised and bequeathed all his real and personal estate in *England*, *Scotland*, and elsewhere, Sir *William Grant* held that the *Scotch* heir must be put to his election, on the ground that if the *English* law prevailed, a devise of land in *Scotland* was analogous to a devise of copyhold estate in *England;* and that, if the *Scotch* law were resorted to as the rule, there was an express decision of one of the *Scotch* courts, that an *English* will might be read against the *Scotch* heir, for the purpose of putting him to an election.

In

(*a*) 6 *Bro. P. C.* 601. *Toml.* ed. (*b*) 2 *V. & B.* 127.

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In *Brodie* v. *Barry* there was, in effect, no conflict between the law of the two countries, and the *Scotch* heir was, *quâcumque viâ datâ*, put to his election. In *Balfour* v. *Scott* there was a direct conflict of laws, for, if the intestate had been domiciled in *Scotland*, the heir could only have obtained an equal share of the personal estate with the other next of kin, upon the terms of collating the real; but it was decided that the foreign law should not be heard for the purpose of altering or controlling the administration of the personal estate, as governed by the *lex domicilii*. The same principle is applicable to the present case, the only difference being in the accidental result; the application of the principle giving an advantage to the heir in the one case, and not giving him an advantage in the other. Equity and natural justice are equally silent in both cases, *ultrà* the obligation under which a man lies to pay his debts out of some portion of his property; for no reason can be shewn why the municipal law of one country should bend to the municipal law of another. It may be said that the decision in *Drummond* v. *Drummond* is inconsistent with the principle, for which we contend, of excluding the consideration of foreign law from the application of the *lex domicilii* in the administration of personal estate; for in that case, as Sir *William Grant* observed, the personal estate was distributed as if both the domicile and the real estate had been in *Scotland*. But that decision turned upon the nature of a heritable bond, the payment of which by the heir was the foundation of the heir's claim against the personal estate, so that, in reality, the whole question in the cause was a question of foreign law. Now a heritable bond is not so much a security by way of charge or mortgage upon the real estate, as a contract to devote a specific portion of the real estate to the payment of a debt. The real estate descends to the heir, *minus* the heritable bond; and

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and he is not entitled by the *Scotch* law, in respect of the payment of a heritable bond, to exoneration out of the personal estate, as he would be, if he paid a moveable debt. The peculiar nature of a heritable bond being considered, the cases of *Balfour* v. *Scott* and *Drummond* v. *Drummond* support each other, and illustrate the same principle. The whole foundation of the heir's claim in *Drummond* v. *Drummond* failed, for the heritable bond was considered as a debt which, from its nature, was to be struck out altogether from the intestate's liabilities in the administration of his personal assets in this country. There was no departure from the law of the domicile; the municipal law of one country was not made to bend to the municipal law of another; but, the nature of the foreign instrument being ascertained, and it appearing that the heir filled the character of heir only, *quoad* the real assets descended to him, *minus* that portion of them which was liable to the payment of the heritable bond, the intestate's personal assets were distributed according to the law of the domicile, exactly as they were distributed in *Balfour* v. *Scott*.

The distinctions between real and personal assets in respect of their application to the payment of debts, which until a recent statute have been recognised in this country, depend upon principles of tenure not applicable to the laws of foreign countries: *Wright*'s *Laws of Tenures* (*a*); and if the municipal law of foreign countries were permitted to alter or control the administration of personal property as governed by the law of the domicile, the greatest confusion and uncertainty would be introduced, and a different measure of justice would be applied, according as the intestate, though domiciled in this country, might happen to have real property

(*a*) pages 29. 153. 168.

property situate in *France* or *Russia*, or any other foreign country.

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Mr. *Tinney* and Mr. *Everett*, *contrà*.

The co-heirs of Lady *Mary Ker* have a clear equity to be repaid out of the personal assets, and the exceptions must, therefore, be overruled. It is not disputed that the debts were paid by the co-heirs, under the distinct understanding that the payment was to be made without prejudice to the mutual claims of relief as between the co-heirs and the executor. Though this Court has no direct jurisdiction over real estate situate in *Scotland*, it may collaterally obtain such jurisdiction by virtue of a contract between parties interested in the real and personal estate of the intestate. *Jamaica* and every other colonial possession of *Great Britain*, may, in one sense, be considered as much a foreign country as *Scotland*, for most of our colonies have peculiar laws in respect of real estate, differing from the law of real property in this country. In the great case of *Penn* v. *Lord Baltimore* (*a*), Lord *Hardwicke* decreed specific performance of articles executed in *England*, concerning the boundaries of two provinces in *America*, upon the principle that collaterally, and by reason of the contract between the parties, matters, originally out of the jurisdiction of the Court, might be brought within it. It was argued, on the other side, that the co-heirs had no equitable claim to relief in this Court, first, because, by the law of nature, there was no distinction between real and personal property, and both species of property were equally liable to the payment of debts; and secondly, because the law of *Scotland* in respect to real estate situate in that country, could not be permitted to vary the administration of personal assets, as governed by

(*a*) 2 *Ves.* sen. 444.

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by the law of the domicile. As to the argument founded upon the law of nature, it is beside the question; for if the distinction between real and personal property is artificial, so also is the obligation to pay debts. All rights in respect of property are the creatures of an artificial state of society. If the argument on the other side were to prevail, the liability, as between the executor and the heir of a person domiciled in this country, and possessing land in another, would depend, not upon an adjudication of rights, but upon mere chance; and it would be left to accident or caprice to determine, whether the real or the personal property of the debtor should bear the burthen of his obligations. Is it just or equitable that a debtor's *Scotch* estate should be burthened, because his executor in this country may throw difficulties in the way of the creditors, and prevent them from obtaining an immediate distribution of the assets? By the law of *Scotland* (*a*), if a moveable debt is paid by the heir, he has a right to call for an assignment of the debt; or he may, without such assignment, bring an action of relief against the executor. The heir, in respect of such debt, is to all intents and purposes a stranger; and if he pays it, he stands in the place of the creditor. Upon what principle of equity can it be contended that this Court shall refuse the same measure of justice which the heir is entitled to in *Scotland*, and declare that the executor shall not be called upon to repay the debt? Who was the person liable, by the *English* law, to pay the debt at the time of the death of the debtor? The representative of the personal estate; and, if any other person pays the debt, that other person stands in the place of the creditor. Supposing a person domiciled in this country, and possessing real estate in *France*, which the *French* law puts upon the same footing as personal property, to die intestate,

(*a*) *Ersk. Inst.* 671.

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intestate, and that the heir paid a debt by the sale of part of the *French* real estate, can there be any doubt that, if the debtor's personal estate were administered in a suit in this Court, the heir would be entitled to contribution? The fallacy of the argument on the other side, consists in supposing that the payment of a debt by a foreign heir, extinguishes the debt, whereas the effect of such a payment is to place the heir in the situation of the creditor, and to clothe him with all the creditor's rights.

With respect to the authorities which have been cited, all that *Balfour* v. *Scott* proves, is that the *Scotch* law was not heard for the purpose of varying the rights of the next of kin. In that case there was no question as between debtor and creditor, and the Court refused altogether to import the *Scotch* law. In the present case the *Scotch* law must be imported, for the purpose of shewing that the heir was liable and compellable to pay a moveable debt; and, it being imported for that purpose, it must also be imported for the purpose of shewing that the heir, being compellable to pay, is also entitled, upon payment, to stand in the place of the creditor. *Drummond* v. *Drummond* is the converse of the present case; and if the personal estate, out of which the heritable bond was, in the first instance, directed to be paid, was relieved against the heir, why should not the heir be relieved against the personal estate? It is said that a heritable bond is a portion of the real estate, and distinguishable from other debts; but is a heritable debt more a portion of the real estates than the bond debt, which has been paid by the heir, is a portion of the personal estate? Creditors and legatees take portions of the personal estate, as much as the heritable creditor takes a portion of the real estate. *Brodie* v. *Barry* has no application to the present case, because

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because there the testator made an express disposition of his *Scotch* estates.

In cases where there is a *conflictus legum*, the Court may have either to elect between the two conflicting laws and apply one of them to the particular case; or, neither of the conflicting laws may be separately applicable to the particular case, and the Court may have to compound them. If the laws of two countries agree, the same rule is applicable to the property situate in either of them. By the law of *England*, the debts in question are payable out of the personal estate. By the law of *Scotland*, the heir may be compelled to pay them in the first instance, but ultimately the personal estate must pay them. There is substantially, therefore, no conflict in this respect between the two laws, and the heir is entitled to the same measure of relief here as he would be in *Scotland*.

Dr. *Storey*, now an *American* judge, makes the following observations, in his Commentaries on the conflict of laws (*a*); a book of authority, and which has of late been frequently cited with great respect in the House of Lords.

"In the course of administrations, also, in different countries, questions often arise as to particular debts, whether they are properly and ultimately payable out of the personal estate, or are chargeable upon the real estate of the deceased; and in all such cases the law of the domicile of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator. A case, illustrating this doctrine, occurred in *England* many years ago. A testator, who lived in *Holland*,

(*a*) page 412.

Holland, and was seised in real estate there, and of considerable personal estate in *England*, devised all his real estate to one person, and all his personal estate to another, whom he made his executor. At the time of his death, he owed some debts by specialty, and some by simple contract in *Holland*, and had no assets there to satisfy those debts; but his real estate was, by the laws of *Holland*, made liable for the payment of simple contract, as well as specialty debts, if there were not personal assets to answer the same. The creditors in *Holland* sued the devisee, and obtained a decree for the sale of the lands devised for the payment of their debts. And then the devisee brought a suit in *England* against the executor (the legatee of the personalty), for reimbursement out of the personal estate. The Court decided in his favour, upon the ground that in *Holland*, as in *England*, the personal estate was the primary fund for the payment of debts, and should come in aid of the real estate, and be charged in the first place. (*a*) In the *Scottish* law a very different principle prevails; for there, heritable bonds are primarily payable out of the real estate, and the personal estate of a person domiciled and dying in *England* is held exonerated from the charge of a heritable bond made by him upon real estate in *Scotland*, to secure a debt contracted in *England;* and the *Scottish* estate must bear the burthen." *Drummond* v. *Drummond.* (*b*)

The law of the domicile must, no doubt, determine the administration of the personal property of the debtor, and by that law the personal property of Lady *Mary Ker* was, as such, primarily liable to the payment of her bond debts, as was the real estate in *Drummond* v. *Drum-*

(*a*) *Anon.* 9 *Mod.* 66.; *Bowaman* v. *Reeve*, *Pr. in Ch.* 577.

(*b*) 6 *Bro. P. C.* 601. *Toml.* edit.

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v. *Drummond* liable to the payment of the heritable bond.

Mr. *Pemberton*, in reply.

Jan. 29. *The* Master *of the* Rolls (after stating the facts).

The question in this case arises upon the fact that the debtor was not domiciled in *Scotland*, but in *England*; and it was argued both as a question of general law, and as a question upon the principles of *Scotch* law.

From the inquiry, directed by the decree, it seems that this Court considered that the question was to be determined by the law of *Scotland*; and from the inquiry directed by the Lord Ordinary in the relief suit in *Scotland*, it seems that the Lord Ordinary considered that the question was to be determined by the law of *England*.

By the law of *England*, the personal estate is the primary fund for the payment of all debts contracted by the deceased person whose estate it was.

By the law of *Scotland*, moveable debts are primarily and properly chargeable upon the personal estate. The creditor may, indeed, enforce payment against the real estate in the hands of the heir; but, if he does so, the heir is entitled to relief against the executors out of the personal estate; in other words, according to the law of *Scotland*, the real estate, though subject to the payment of moveable debts, is only a subsidiary fund for the purpose of payment. Payment by the heir does not extinguish the debt, but vests in him a right to recover the amount against the personal estate, and constitutes him a creditor against the personal estate; and whether he

he can enforce payment against the personal estate, which is to be distributed according to the laws of another country, which makes the personal estate the primary fund for the payment of debts, is the question.

Primâ facie there would seem to be no difficulty; the heir, having by the law of the country in which the land lies, a right to relief or exoneration, would seem to be at liberty to make that right available in a country where the personal estate is the primary fund for the payment of all debts.

But it is objected, that, in all the opinions upon which the finding of the Master rests, it has been assumed that the law of domicile makes no difference, whereas it is clear that the domicile determines the law by which the personal estate is to be distributed; and that, although it be true that in *England* the personal estate must be applied in exoneration of the *English* heir of real estate, yet that the right of the heir to be exonerated is founded on the law peculiar to *England*, and that a foreign heir of foreign lands is not entitled to the same relief as an *English* heir of *English* lands. The law of *England*, it is said, affords no relief to foreign real estate out of *English* personal estate; and although the law of *Scotland* regulates the administration of the real estate, and provides that the real estate, if applied in payment of personal debts, shall be exonerated out of the personal estate, the proposition must be limited to personal estate of which the distribution is regulated according to the law of *Scotland*, and consequently to the personal estate of debtors domiciled in *Scotland*.

Several cases were cited. They sufficiently establish the propositions, which are not disputed on either side; and *Drummond* v. *Drummond* establishes that a *Scotch*

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heir is ultimately liable to pay heritable debts which have, in the first instance, been paid out of the personal estate distributable according to the law of *England;* but no case has occurred in which it has been decided that the *Scotch* heir, having paid moveable debts, is entitled to be relieved out of the personal estate distributable according to the law of *England;* and that is the question here.

The personal estate is taken by the administrator, according to the law of *England*, subject to the payment of all the debts of the intestate.

The real estate is taken by the heir, according to the law of *Scotland*, subject to the payment of all moveable debts, but with a right of relief out of the personal estate, and subject to the payment of all heritable debts without such right of relief.

As to the heritable debts, in respect of which there is no such right of relief, the heir is not entitled to the benefit of the *English* law, which makes the personal estate subject to the payment of all debts. The *Scotch* law, which makes the heir ultimately liable to the payment of such debts, and which governs the distribution of the real estate, prevails in favour of the persons entitled to the personal estate distributable according to the law of *England.*

As to personal debts, in respect of which there is such right to relief, the *English* law subjects the personal estate to all debts; the *Scotch* law relieves the real estate as far it can consistently with the claims of the creditors. The heir, by paying, satisfies the creditor, but at the same time acquires for himself a right of demand against the executor; he may, if he pleases, take an assignation of

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of the debt, and make it available; but that is not necessary, because, without any assignation, his own claim to relief subsists and constitutes him a creditor against the personal estate.

Under these circumstances the question does not appear to me to be fully stated, when it is said to be whether a foreign heir of foreign lands is entitled to the same relief as an *English* heir of *English* lands. The case is, that a foreign heir of foreign lands is, in respect of those lands, subsidiarily liable to pay debts to which the personal estate, distributable according to the law of *England*, is primarily liable; and that, having paid the debt, he is by the law of the country in which the land lies constituted a creditor upon the personal estate distributable according to the law of that country. And it is under these circumstances, and without reference to *English* tenures, or the title to exoneration which an *English* heir may possess, that the question arises, whether the subsidiary debtor, or the person who by the law of a foreign country is constituted surety for the payment of debts, primarily chargeable on another fund, and paying the debts by force of, and according to the law which constitutes him a creditor upon that other fund, is or is not entitled to make his title as creditor available in another country, where the personal estate is distributable, and where the law makes the personal estate primarily liable to the payment of all debts. And, upon consideration of the case, I am of opinion, that the right of relief or demand against the personal estate, which in the administration of the real estate by the law of *Scotland* is vested in the heir who has paid moveable debts, is capable of being made available in *England*, where the personal estate is the primary fund for the payment of all debts.

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In this case the personal estate seems to have been principally, if not wholly, in *England*; but whether in *England* or in *Scotland*, it was, by reason of the domicile, to be administered according to the law of *England*, and it was with reference to this, that the judges of the Court of Session asked the opinion of *English* lawyers before their decision in the relief suit; and in relying upon that decision, and the several opinions which are set forth in the report, it does not appear to me that the evidence before the Master was not sufficient to support the conclusion at which he has arrived; and I am of opinion that the exceptions must be overruled, and that, upon the petition, the report must be confirmed. And I think that an order should be made for the application of the personal estate of Lady *Mary Ker* in satisfaction of her share of the personal debts which have been paid out of the proceeds of her real estates in *Scotland*; and the amount thereof, if not already ascertained, ought now to be ascertained by proper inquiries before the Master. The argument having been employed upon the question of right, nothing was said upon the details, and without further assistance from the bar I am unable to state whether the sums are correctly stated in the petition. (*a*)

(*a*) See *Burge's Commentaries on Colonial and Foreign Laws*, vol. iv. p. 722. *et seq.*

NIAS *v.* The NORTHERN and EASTERN RAILWAY Company.

THE decision in this case (*b*) was appealed from, and affirmed by the Lord Chancellor.

(*b*) 2 *Keen*, 76.

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March 30, 31.

A testator gave 3000*l.* stock to trustees, in trust to authorise his bankers to receive the dividends, and invest the same from time to time in the purchase of more capital in the same stock, to be accumulated for so many years as *M. J.* should live; and after the death of *M. J.*, in trust, to pay the 3000*l.* stock, with the increased capital and accumulations, to *R. T.* and his issue. And the testator, after disposing of other parts of his property, gave the residue of his personal estate to *R. T.*, and his issue. Twenty-one years elapsed from the death of the testator, and *M. J.* was still living.

Held, that the income of the 3000*l.* stock, and accumulations, after the twenty-one years, and until the death of *M. J.*, was undisposed of, and belonged to the residuary legatees.

STUCLEY LUCAS, by his will, dated the 6th of *May* 1809, gave and bequeathed to the trustees therein named, certain government stock and annuities to which he was entitled under his marriage settlement, and the sum of 1500*l.* secured by a mortgage, upon trust to apply the dividends and interest, or such part thereof, as they should think proper, to the maintenance and education of his son *Robert Tristram Lucas*, till he should attain the age of twenty-four years, and then to apply the whole of the dividends and interest for the use and benefit of his said son, with power to settle the whole or any part of the dividends and interest for the benefit of any woman he should marry, upon the conditions therein mentioned; and after the death of *Robert Tristram Lucas*, or after the death of any such woman as aforesaid, if she should survive, upon trust to pay and apply the whole of the dividends and interest to the maintenance and education of all and every the children of *Robert Tristram Lucas*, until they should respectively attain the age of twenty-one, and then to assign and transfer the government stock and annuities, and mortgage money, unto and among all such children equally as should attain the age of twenty-one; and in case any of them should die under twenty-one, the share or shares of him, her, or them so dying, to be equally divided among the survivors who should attain that age; and if all but one should die under twenty-one, then the whole to the surviving child who should attain twenty-

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twenty-one. And if his son *Robert Tristram Lucas* should leave no child who should attain twenty-one, then upon trust to assign and transfer the government stock and annuities, and mortgage money, unto all and every the children of his son *Stuckley Tristram Lucas*, except his eldest son, in like manner as thereinbefore directed; and if there should be no child of *Stuckley Tristram Lucas*, who should attain twenty-one, then to the executors, administrators, and assigns of his son *Robert Tristram Lucas*. And the testator gave and bequeathed to other trustees therein named, the sum of 7000*l.* three per cent. consolidated Bank annuities, upon trust, as to 3000*l.* part thereof, to authorize Messrs. *Child* and Co., bankers, to receive the dividends thereof half yearly, and to invest the same, from time to time as the same should be received, in the purchase of more capital in the same stock, in the names of the said trustees and the survivors and survivor of them, his executors and administrators, in order to consolidate with the original capital all such dividends so received for so many years as *Mary Jacob* should happen to live; and, after the death of *Mary Jacob*, upon trust, to pay, apply, assign, and transfer the said 3000*l.* consolidated Bank annuities increased and consolidated with the accumulations of the dividends thereof, and the dividends, income, and produce thereof to arise and be received in respect of the same, unto and for the use and benefit of the testator's son, *Robert Tristram Lucas*, and his issue, in the manner and subject to the powers, provisos, and regulations thereinbefore declared concerning his government stock, and annuities, and mortgage money. And the testator, after disposing of other parts of his property, gave the residue and remainder of such personal estate as he should die possessed of, and which should not be given and disposed of by that, his will, to the same trustees (whom he also appointed his executors), upon trust, to be by them paid, applied, and disposed of, to and for the

the benefit of his said son, *Robert Tristram Lucas*, and his issue, in like manner as the said government stock and annuities, and mortgage money, and the annual income thereof were thereinbefore directed to be paid and applied for his and their use.

More than twenty-one years had elapsed since the death of the testator, and *Mary Jacob* was still living, and a Defendant in this suit. The question in the cause was, to whom the income of the 3000*l.* stock, and of the accumulations thereof, from the period at which the direction for accumulation was void under the statute until the death of *Mary Jacob*, would belong.

Mr. *Pemberton*, for the Plaintiffs, who were the children of one of the testator's next of kin, cited *Macdonald* v. *Bryce* (*a*) where the point was similar to that now raised; and the Court decided that the income, after the period allowed by law for accumulation had ceased, went to the next of kin.

Mr. *Stuart*, for parties whose annuities were charged upon the testator's residuary personal estate, said, that this case was distinguishable from *Macdonald* v. *Bryce*. There the excessive accumulation was directed by the residuary clause, and for that reason the income beyond the period allowed by law was held to belong to the next of kin. Here the unlawful accumulation was directed by a clause in the will; and the residuary legatees were consequently entitled to the benefit of the failure. The income of the accumulations of the 3000*l.* stock, after the twenty-one years, and until the death of *Mary Jacob*, would form part of the capital of the residue. *Crawley* v. *Crawley*. (*b*)

Mr.

(*a*) *suprà*, page 276. (*b*) 7 *Sim.* 427.

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Mr. *Kindersley*, for the Defendant *Robert Tristram Lucas*, contended that he and his children took a vested interest in the legacy of 3000*l.* stock, and the accumulations, their enjoyment only being postponed until after the death of *Mary Jacob*, and that they were entitled to the income after the period at which the direction for accumulation ceased to be lawful, and also to the income of the lawful accumulation, until the event should happen when they would be entitled to the capital and the accumulations. The cases cited were cases in which the interest of the legatees, claiming to be entitled to the excessive accumulations, was contingent and not vested.

Mr. *Benson*, for the Defendant *Mary Jacob*.

Mr. *Bethell*, for other Defendants.

March 31. *The* MASTER *of the* ROLLS decided that the income of the 3000*l.* stock, after the period allowed by law for accumulation had elapsed, and until the death of *Mary Jacob*, was undisposed of, and consequently, in this case, belonged to the residuary legatees. The income of the accumulations would form part of the capital of the residue.

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READ *v.* TREACHER.

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MR. *PEMBERTON* moved for leave to amend the bill by striking out the name of the Plaintiff, *James Read*, who had been joined as a co-Plaintiff with his wife *Martha Read*, the suit being instituted to recover a legacy given to her separate use; by making the wife sue by a next friend; and by making the husband a Defendant.

An application for leave to amend by striking out the name of a plaintiff, must be made to the Court, the Master having no jurisdiction under the 3 & 4 *W.* 4. *c.* 94. in a matter which may have the effect of altering the situation of the defendant with respect to his security for costs.

Mr. *Kindersley* objected that this was an application which, by the thirteenth and fourteenth sections of the 3 & 4 *W.* 4. *c.* 94., was within the exclusive jurisdiction of the Master, and ought not to have been made to the Court. The common order to amend had been obtained, and the amendment might have been made under that order.

Mr. *Pemberton*, in reply, said it was settled that the name of a Plaintiff could not be struck out under the common order, for that was an amendment which diminished the Defendant's security as to costs.

The MASTER *of the* ROLLS said that the Master's jurisdiction in applications for leave to amend was exclusive in those cases only where mere amendment was the object of the application. If any thing was sought besides the amendment, as in a motion for leave to amend without prejudice to the injunction (*a*), the application must be made to the Court. The effect of granting an application for leave to amend, by striking out

(*a*) *Rees* v. *Edwardes*, 1 *Keen*, 465.

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READ v. TREACHER.

out the name of a Plaintiff, was to alter the Defendant's situation with respect to his security for costs, and this was a matter in which the Master had no jurisdiction. The Plaintiff's motion was properly made to the Court; but, the object of the motion being to correct an error in the frame of the suit, the Plaintiff must pay the costs of the application.

March 31.

HALE *v.* LEWIS.

A bill having been dismissed with costs on the non-appearance of the Plaintiff's solicitor, the cause was, upon a petition supported by affidavit, ordered, under the circumstances, to be set down again to be heard upon payment of costs by the Plaintiff.

MR. *GIRDLESTONE* presented a petition, praying that the cause might be again set down to be heard, the bill having been dismissed with costs in the absence of the Plaintiff's solicitor. The affidavit, by which the petition was supported, stated that the Plaintiff's solicitor was compelled, on the day upon which the cause came on to be heard, to attend at the trial of an indictment involving the life of a person; that he had watched the cause for several days; and that the dismissal of the bill, under circumstances which afforded no opportunity for bringing the merits of the case before the Court, arose from his having changed his managing clerk.

Mr. *Pemberton, contrà.*

The MASTER *of the* ROLLS thought that, under the circumstances, he might order the cause to be set down again to be heard, upon payment of costs by the Plaintiff.

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March 5.
April 6.

T. B. was indebted to *C. B.*, his sister, in the sum of 1878*l.* He became bankrupt, and shortly after his bankruptcy *C. B.* made her will, whereby she gave legacies of 500*l.* and 2000*l.* to her executors, in trust to pay the interest thereof, (as to the 500*l.* after the decease of her mother,) to *T. B.* for his life, without power of anticipation, and free from his debts; and after his decease to pay the principal to such persons as he should appoint, and in default of appointment to his executors and administrators, for his and their own use and benefit.

CATHERINE FRANCES BOULTBEE, by her will, dated in the month of *December* 1821, gave and bequeathed to the Rev. *Richard Moore Boultbee*, and *William Bradley*, all her personal estate, upon trust, that they, *Richard Moore Boultbee*, and *William Bradley*, or the survivor of them, his executors and administrators, should, as soon as conveniently might be after her decease, sell, dispose of, and convert into money, so much thereof as should not consist of money, and receive, recover, and get in all such debts and sums of money as should be due and owing to her at the time of her decease from any person or persons whomsoever; and upon further trust, in the first place out of the monies so collected and received, to pay and discharge all her just debts and funeral and testamentary expenses; and upon further trust, to invest the sum of 2000*l.* in the public funds, or upon government or real securities, and to stand possessed of the trust monies, upon trust, to pay, apply, and dispose of the interest, dividends, and yearly produce thereof to her mother *Catherine Boultbee*, during her life; and after her decease, upon trust, to sell out, or call in and compel payment of the principal sum of 1500*l.*, part thereof for the purposes therein mentioned, and the sum of 500*l.* residue thereof, in augmentation of the fund thereinafter directed to be raised, with the sum of 2000*l.* next thereinafter directed to

T. B. died without having obtained his certificate, and without having attempted to make any appointment:

Held, that the executors of the testatrix had no right to set off the debt due from *T. B.* to the testatrix against the legacies, but that the assignee of *T. B.* was entitled to so much of the legacies as the assets were sufficient to pay.

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to be invested by her said trustees for the benefit of her brother *Thomas Boultbee*, and which she willed should be held upon the same trusts as the same fund of 2000*l.* would by that her will be declared, and in the same manner as if originally bequeathed therewith. And she thereby directed and declared that her trustees, or the survivor, &c. should, out of the residue of the monies from her personal estate as aforesaid, place out and invest, in their or his names or name, the sum of 2000*l.* in the public funds, or upon government or real securities, and stand possessed of the trust monies, upon trust, yearly and every year during the natural life of her brother *Thomas Boultbee*, to receive the interest, dividends, and annual produce thereof, and pay the same, by equal half-yearly payments in each year, into the proper hands of *Thomas Boultbee*, and obtain his receipt for the same, without the same being liable to be assigned or charged by *Thomas Boultbee* in anticipation; it being her mind and will that *Thomas Boultbee* should not have any power at any time to charge in anticipation, or assign the said half-yearly payments to any person or persons; and that the same should not be in any manner liable or subject to his debts, contracts, or engagements: and after the decease of *Thomas Boultbee*, upon trust, to pay and transfer the last-mentioned principal trust monies unto and among such person or persons as *Thomas Boultbee* should, by deed or will, appoint; and in default of such appointment, unto the executors or administrators of *Thomas Boultbee*, to and for his and their own use and benefit. And the testatrix appointed *Richard Moore Boultbee*, and *William Bradley*, executors of her will.

The testatrix died in the month of *January* 1823, and her will was proved by the executors named therein.

Catherine

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Catherine Boultbee, the testatrix's mother, died in the month of *January* 1828; and, after her death, the executors of the testatrix paid to *Thomas Boultbee* the interest of a sum of 1267*l.* 10*s.* until the year 1833, when they received notice of the claim of the Plaintiff.

At the date of the will, *Thomas Boultbee*, the legatee named therein, was indebted to the testatrix in the sum of 1878*l.* 5*s.*, for which he gave a charge on certain real estate, subject to prior incumbrances.

Shortly before the date of the will, and on the 13th of *November* 1821, a commission of bankrupt was issued against *Thomas Boultbee*, under which he was declared a bankrupt, and the Plaintiff became assignee of his estate and effects. The testatrix did not prove her debt under the commission. *Thomas Boultbee* went abroad shortly after the date of the commission, and he died in the month of *December* 1833, without having obtained his certificate, and without having made any appointment by deed or will of the sums of 500*l.* and 2000*l.*, bequeathed to him under the will of the testatrix.

The bill was filed by *Edward Cherry*, the assignee of the estate and effects of *Thomas Boultbee*, against the executors and trustees of the testatrix; and it prayed, that the Plaintiff might be declared entitled to the sum of 2000*l.*, with interest, from one year after the death of the testatrix, and to the sum of 500*l.*, with interest, from the death of *Catherine Boultbee*, and for payment of what should be due to him in respect of such sums and interest; and if the Defendants should not admit assets, for the usual accounts.

The testatrix's estate was insufficient for the payment in full of the legacies of 2000*l.* and 500*l.*, given for the benefit

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benefit of *Thomas Boultbee*, there being only the before-mentioned sum of 1267*l.* 10*s.* applicable to the satisfaction of the same; and the question in the cause was, whether the Plaintiff was entitled to that sum, or whether the Defendants were entitled to set off the debt due from *Thomas Boultbee* to the testatrix, which, together with interest, exceeded the sum of 2500*l.* against the claim of the Plaintiff.

Mr. *Pemberton* and Mr. *Cole*, for the Plaintiff, contended that there was no ground for the claim of set-off raised by the Defendants in their answers. The testatrix had the benefit of the charge upon *Thomas Boultbee*'s real estate; and, after his bankruptcy, she did not think fit to prove her debt against his estate. She intended by the legacies given to the bankrupt to make a provision for him; and, if he had obtained his certificate at her death, her intention would have been effected. In the result, the legacies vested in the Plaintiff; but neither at the time of the bankruptcy, or at the death of the testatrix, was there any mutual debt and credit which could be the subject of set-off. If the bankrupt had obtained his certificate before the death of the testatrix, could it be contended that he must have paid the debt to the executors, before he could have claimed the interest given to him by the will? If not, the assignee stands in his place, and is entitled to the legacies, free from the claim of set-off. In *Ex parte Blagden* (*a*), it was held, that a husband could not set off a debt due from the bankrupt to his wife, *dum sola*, against a debt due from himself to the bankrupt.

Mr. *Kindersley* and Mr. *Lowndes*, for the Defendant *Richard Moore Boultbee*, insisted that *Thomas Boultbee*, if

(*a*) 2 *Rose*, 249.

if the legacies had vested in him, would have been liable to pay the debt, and that the assignee could not be in a better situation than the bankrupt. In *Jeffs* v. *Wood* (*a*), the assignees of a bankrupt to whom a legacy had been left, and who also was indebted to the testator, filed a bill for the legacy; and it was held that the assignees were entitled to only so much of the legacy as remained after deducting what was due to the testator. In *Ranking* v. *Barnard* (*b*), the testatrix gave a legacy to the wife of one who was largely indebted to the testatrix, and who afterwards became bankrupt. On the death of the wife, the assignees filed a bill against the executors for the payment of the legacy; and it was held, that, as against the husband, the executors would have had a right to set off the debt due from the husband to the estate of the testatrix against the legacy, and that they had the same right against the assignees.

Ex parte Man (*c*) was a direct authority to shew, that a debt, due from a legatee who becomes bankrupt, is to be set off against the legacy. In that case a testator, who had proved a debt of 424*l.* against the separate estate of a bankrupt, bequeathed to the bankrupt, before he obtained his certificate, the sum of 200*l.* The testator's executor having received, under the commission, a dividend of 5*s.* in the pound upon the whole debt, and having refused to pay the legacy to the assignee, the Vice-Chancellor, upon the petition of the assignee, ordered the proof to be reduced to 224*l.*, and directed the executor to refund the excess of dividend. By the will, *Thomas Boultbee* had only a power of appointment over the corpus of the 2500*l.*, which, if the power was not

(*a*) 2 *P. Wms.* 128.
(*b*) 5 *Mad.* 32.
(*c*) *Mont. & M'Arth.* 210.

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not exercised, was given to the executors and administrators for their own use and benefit.

Mr. *Tinney* and Mr. *Turner*, for the Defendant *Bradley*.

Mr. *Pemberton*, in reply.

Where personal property is given to a man for life, with a power of appointment, and in default of appointment to his executors and administrators, the legatee, by analogy to the rule as to real estate, will take an absolute interest: *Kirkpatrick* v. *Capel*. (*a*) As to the words, "own use and benefit," they are preceded by the words "his and their;" and it is clear that no interest was intended to be given to the executors and administrators, except for the benefit of the person whom they should represent. Unless the testatrix intended that the debt should be set off against the benefit given to the bankrupt—in other words, unless she intended to render the provision she made for him by her will nugatory, it is impossible to contend successfully that the executors are entitled to set off the debt against the claim of the assignee whose interest must be identical with that of the bankrupt.

April 6. *The* MASTER *of the* ROLLS.

The question in the cause is, whether the Defendants, the executors of *Catherine Frances Boultbee*, have a right to set off the legacies given to the uncertificated bankrupt against the debt due from him to the testatrix at the time of his bankruptcy; and I am of opinion that they have not. The debt due to the testatrix was due at

(*a*) Cited in *Sugd. Pow.* vol. i. p. 79. 6th edit.

at the time of the bankruptcy. The testatrix had a right to prove the debt under the commission, and the bankrupt's estate had no claim whatever against her. Afterwards, desiring to make a provision for the bankrupt, who was her brother, she made a will, which, if he had obtained his certificate, would have given him an absolute right to the legacies; and clearly her intention was to protect him against his creditors. But he never obtained his certificate; and that right, which would have been his, if he had done so, became vested in his assignee; that is, by an event (the death of the testatrix having made this will) which took place after the bankruptcy, the assignee became entitled to claim and sue for the legacy; and as the legacy was never an interest vested in the bankrupt, and is now only a right of suit in the assignee, I think there is no right of set-off, and that the Plaintiff is entitled to have so much of the legacies as the assets are sufficient to pay.

It does not appear that the debt has ever been proved, and at the hearing nothing was said as to the right of proof. Subject to any thing which the parties may be inclined to address to me on that point, I think that the executors have a right to prove, and to deduct the dividend payable on the proof from the amount of the sum which they are liable to pay.

The conclusion to which I have come in this case appears to differ from the conclusion of Sir *John Leach*, in *Ex parte Man;* and, if there were no special circumstances in that case, must, I am afraid, be considered as inconsistent with it.

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April 18.

YARNALL *v.* ROSE.

A plea and answer were ordered to stand for an answer, with liberty to the Plaintiff to except; and the order was silent as to costs.

A motion to have the costs occasioned by the plea and answer taxed, and that the Defendant might be ordered to pay the same when taxed, was refused.

THE plea and answer of the Defendants were ordered, at the hearing, to stand for an answer, with liberty to the Plaintiff to except. No order was made as to costs.

Mr. *Coleridge*, on the part of the Plaintiff, now moved that the Master might be directed to tax the costs occasioned by the Defendant's plea and answer, and that the Defendants might be ordered to pay such costs when taxed. He relied on *Howling* v. *Butler* (*a*) as an authority which must govern this case, none of the new orders applying to a case where the plea has been ordered to stand for an answer.

Mr. *Pemberton*, *contrà*, said that, no order as to costs having been made at the hearing of the plea and answer, this application was in fact an application for a supplemental order in the absence of all the circumstances which could enable the Court to judge of the merits of the case. In *Wyatt's Practical Register* (*b*) it was said that where a plea was ordered to stand for answer, costs were seldom given on either side. In the present case, the order had been drawn up, passed, and entered; and the Court must be presumed to have exercised its discretion in making no order as to costs. In *Howling* v. *Butler* it did not appear that the order was drawn up, and the application might have been made to vary the minutes under circumstances not appearing in the report.

Mr.

(*a*) 2 *Mad.* 245. (*b*) page 330.

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Mr. *Coleridge*, in reply.

In *Howling* v. *Butler* the difficulty arose in applying for a *subpœna* for payment of costs, a circumstance which shewed that the order must have been drawn up; and the attention of the Court was distinctly drawn to the passage in the *Practical Register*, and to other authorities upon the point.

The MASTER *of the* ROLLS said there was nothing to support this application except the case before Sir *Thomas Plumer*, which had been cited at the bar. The question of costs ought to have been decided at the time the plea and answer were ordered to stand for an answer; and as nothing was said as to costs in the order, the present application could not be entertained without a rehearing of the case. His Lordship said he would inquire into the practice, and, unless the rule which seemed to have been acted upon in *Howling* v. *Butler* should appear to be the course of the Court, this motion must be refused.

On the next seal-day his Lordship said that he had caused inquiry to be made for the entry of *Howling* v. *Butler* in the registrar's book, but that nothing could be found explaining the circumstances under which the order in that case had been made. It did not appear from the report that the order was made upon notice of motion, or that there was any opposition: and his Lordwas of opinion, that it was not proper, or according to the practice of the Court to open the question of costs upon a subsequent application of this kind.

Motion dismissed with costs.

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Jan. 21. 23, 24.
April 19.

BETWEEN

The Governor and Company of the Bank of ENGLAND, - - - - Plaintiffs;

AND

SAMUEL ANDERSON, HENRY BOSANQUET, FREDERICK BURMESTER, WILLIAM ROBERT KEITH DOUGLAS, JOSEPH ESDAILE, Sir THOMAS FREEMANTLE, CHARLES GIBBES, HENRY HARVEY, JAMES HOLFORD, JONATHAN HAWORTH PEEL, MATTHEW BOLTON RENNIE, PATRICK MAXWELL STEWART, JOHN STEWART, DAVID SALOMONS, THOMPSON PEARSON, and GEORGE ALFRED MUSKETT,

Defendants.

A copartnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, cannot, under the 5 & 4 *W.* 4. *c.* 98. and the other acts now in force respecting the Bank of *England*, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of giving such acceptance.

THE bill, after stating that the Governor and Company of the Bank of *England* were incorporated by that name by an act passed in the fifth and sixth years of the reign of King *William* and Queen *Mary*, proceeded to state that by an act passed in the 8 & 9 *W.* 3. *c.* 20., intituled, An act for making good the deficiencies of the several funds therein mentioned, and for enlarging the capital stock of the Bank of *England*, and for raising the public credit, it was enacted that, during the continuance of the corporation of the Governor and Company of the Bank of *England*, no other bank, or other corporation, society, fellowship, or constitution in the nature of a bank, should be erected, established permitted, suffered, countenanced, or allowed by act of parliament within this kingdom.

That

That by an act made in the sixth year of the reign of Queen *Anne*, intituled, An act for continuing several duties therein mentioned, and for preserving the public credit, and for securing the credit of the Bank of *England*, after reciting the last-mentioned act, and that nevertheless since the passing of that act, some corporations, under colour of the charters to them granted, and other great numbers of persons by pretence of deeds and covenants united together, had presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, to deal as a bank, to the apparent danger of the established credit of the kingdom; it was enacted that from and after the 29th day of *September* 1708, during the continuance of the Governor and Company of the Bank of *England*, it should not be lawful for any body, politic or corporate whatsoever, erected or to be erected, other than the Governor and Company of the Bank of *England*, or for other purposes whatsoever, united or to be united in covenants or partnership exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof.

That by the 39 & 40 *G.* 3., intituled, An act for establishing an agreement with the Governor and Company of the Bank of *England* for advancing the sum of 3,000,000*l.* towards the supply for the service of the year 1800, which act consolidated and confirmed the then existing privileges of the Bank of *England*, after reciting that there were due from the public to the Governor and Company of the Bank of *England* the sums of 3,200,000*l.*, and 8,486,800*l.*, together with the interest payable thereon, it was enacted that at any time, upon

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twelve months' notice, to be given from the 8th of *August* 1833, and upon repayment by parliament to the Governor and Company or their successors of the sum of 3,200,000*l.*, without any deduction; and of all arrears of 100,000*l.* per annum, in the said act mentioned; and upon repayment by parliament to the said Governor and Company of the said further sum of 8,486,800*l.*, together with interest payable thereon; and also upon repayment of all the principal money and interest which should be owing to the governor and company and their successors, upon all such tallies, exchequer orders, exchequer bills, or parliamentary funds, as the Governor and Company or their successors should have remaining in their hands, or be entitled to at the time of such notice to be given as aforesaid, then and in such case the said yearly fund of 100,000*l.* should cease and determine. And after stating that to prevent any doubt that might arise concerning the privilege or power given by former acts of parliament to the said Governor and Company of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the privilege granted to the Governor and Company of the Bank of *England;* it was further enacted and declared that it was the true intent and meaning of this act that no other bank should be erected, established, or allowed by parliament. And it should not be lawful for any body, politic or corporate whatsoever, erected or to be erected, or for any other persons, united or to be united in covenants or partnership exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months time from the borrowing thereof, during the continuance of the said privilege to the Governor and Company, who were thereby

thereby declared to be and remain a corporation with the privilege of exclusive banking, subject to redemption on the terms and conditions in the act mentioned.

That, by an act made in the seventh year of *G.* 4. *c.* 46., intituled "An act for the better regulating copartnerships of certain bankers in *England*, and for amending so much of the act 39 & 40 *G.* 3., intituled, &c., as related to the same; after reciting part of the said act of the 39 & 40 *G.* 3., and that the Governor and Company of the Bank of *England* had consented to relinquish so much of their exclusive privilege as prohibited any body politic or corporate, or any number of persons exceeding six in *England* acting in copartnership from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, provided that such body politic or corporate, or persons united in covenants or partnership, exceeding the number of six persons in each copartnership, should have the whole of their banking establishments, and carry on their business as bankers at any place or places in *England* exceeding the distance of sixty-five miles from *London*; it was enacted that from and after the passing of this act, it should be lawful for any bodies politic or corporate, erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together should consist of more than six in number, to carry on the trade or business of bankers in *England*, in like manner as copartnerships of bankers, consisting of not more than six persons in number; might lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in *England* exceeding the distance of sixty-five miles from *London*, payable on

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demand or otherwise, at some place or places specified upon such bills or notes, and exceeding the distance of sixty-five miles from *London*, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued, at any such place or places as aforesaid; provided always that such corporations or persons carrying on such trade or business of bankers in copartnership should not have any house of business or establishment as bankers at *London*, or at any place or places not exceeding the distance of sixty-five miles from *London*. And it was further enacted that nothing in this act contained should extend or be construed to extend to enable or authorise any such corporation or copartnership exceeding the number of six persons so carrying on the trade or business of bankers as aforesaid, either by any member of or person belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such corporation or copartnership, to issue or reissue in *London*, or at any place or places not exceeding the distance of sixty-five miles from *London*, any bill or note of such corporation or copartnership which should be payable to bearer on demand, or any bank post bill, nor to draw upon any partner, or agent, or other person or persons who might be resident in *London*, or at any place or places not exceeding the distance of sixty-five miles from *London*, any bill of exchange which should be payable on demand, or which should be for a less amount than 50*l.*; provided also that it should be lawful, notwithstanding any thing in this and the recited act contained, for any such corporation or copartnership to draw any bill of exchange for any sum of money amounting to the sum of 50*l.* or upwards, payable in *London* or elsewhere, at any period after the date or after sight. And it was further enacted, that nothing in this act contained should extend to,

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to, or be construed to extend to enable or authorise any such corporation or copartnership exceeding the number of six persons, carrying on the trade or business of bankers in *England*, or any member or members, agent or agents of any such corporation or copartnership, to borrow, owe, or take up in *London*, or at any place or places not exceeding the distance of sixty-five miles from *London*, any sum or sums of money, or any bill or promissory note of any such corporation or copartnership, payable on demand, or at any less time than six months from the borrowing thereof; nor to make or issue any bill or bills of exchange, or promissory note or notes of such corporation or copartnership contrary to the provisions of the 39 & 40 *G.* 3., save as provided by this act in that behalf. Provided also that nothing in this act contained should extend, or be construed to extend, to prevent any such corporation or copartnership, by any agent or person authorised by them from discounting in *London* or elsewhere, any bill or bills of exchange not drawn by or upon such corporation or copartnership, or by or upon any person on their behalf. And it was further enacted, that nothing in this act should extend or be construed to extend to prejudice, alter, or affect any of the rights, powers, or privileges of the Governor and Company of the Bank of *England*, except as the exclusive privilege of the said Governor and Company was by this act specially altered and barred.

That by an act passed in the 3 & 4 *W.* 4. *c.* 98., intituled, "An act for giving to the corporation of the Governor and Company of the Bank of *England*, certain privileges for a limited period under certain conditions," after reciting the act of the 39 & 40 *G.* 3., and the act of the 7 *G.* 4., and reciting that it was expedient that certain provisions of exclusive banking should be

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continued to the Governor and Company for a further limited period, upon certain conditions; and reciting that the Governor and Company were willing to deduct and allow to the public, from the sums then payable to the Governor and Company, for the charge and management of the public unredeemed debt, the annual sum in this act mentioned, and for the period in this act mentioned, provided the privilege of exclusive banking, specified in this act, was continued to the Governor and Company for the period in this act mentioned, it was enacted that the Governor and Company of the Bank of *England* should have and enjoy such exclusive privilege of banking as is given by this act, as a body corporate, for the period and upon the terms and conditions in this act mentioned, and subject to the termination of such exclusive privilege, at the time and in the manner in this act specified. And it was further enacted, that during the continuance of the said privilege, no body politic or corporate, and no society or company, or persons united or to be united in covenants or partnership, exceeding six persons, should make or issue in *London*, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same might obtain payment on demand; provided always, that nothing in this act, or in the act of 7 G. 4. contained, should be construed to prevent any body politic or corporate, or any society or company, incorporated company, or corporation or co-partnership, carrying on and transacting banking business at any greater distance than sixty-five miles from *London*, and not having any house of business or establishment as bankers in *London*, or within sixty-five miles thereof, except as in this act and after mentioned, to make and issue their bills and notes, payable on demand or otherwise, at the place in which the same should be issued,

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issued, being more than sixty-five miles from *London*, and also in *London*, and have an agent or agents in *London*, or at any other place in which such bill should be made payable, for the purpose of payment only; but no such bill or note should be for any less sum than *5l.*, or be re-issued in *London* or within sixty-five miles thereof. And after further reciting, that the intention of this act was, that the Governor and Company of the Bank of *England* should, during the period stated in this act (subject to such redemption as in this act mentioned), continue to hold and enjoy all the exclusive privileges of banking given by the act of the 39 & 40 *G.* 3., as regulated by the 7 *G.* 4., or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking; and reciting that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege, and that it was expedient that all such doubts should be removed, it was declared and enacted that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided such body politic or corporate, or society, or company, did not borrow, owe, or take up in *England*, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege granted by this act to the Governor and Company of the Bank of *England*. And it was further enacted, that upon one year's notice given within six months after the expiration of ten years from the 1st of *August* 1834, and upon repayment by parliament to the said Governor and Company, or their successors, of all principal money, interest, or annuity, which might be due from the public to the said Governor and Company, at the time of the expiration of such

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such notice, in like manner as after stipulated, and provided, in the event of such notice being deferred until after the 1st of *August* 1853, the said privilege of exclusive banking, granted by this act, should cease and determine at the expiration of such year's notice. And it was further enacted, that from and after the 1st of *August* 1834, the Governor and Company, in consideration of the privilege of exclusive banking given by this act, should, during the continuance of such privileges, but no longer, deduct from the sums then payable to the Governor and Company, for the charges of management of the public unredeemed debt, the annual sum of 120,000*l.*, any thing in any act or acts of parliament or agreement to the contrary notwithstanding. And it was further enacted, that all the powers, authorities, franchises, privileges, and advantages, given or recognised by the 39 & 40 *G.* 3., as belonging to and enjoyed by the Governor and Company of the Bank of *England*, and by any subsequent act or acts of parliament should be, and the same were thereby declared to be in full force, and continued by this act, except so far as the same were altered by this act, subject nevertheless to such redemption upon the terms and conditions as in this act mentioned.

The bill then stated, that previously to and in the month of *August* 1833, certain persons formed a plan to associate themselves together in company or partnership with others, for the purpose of establishing a banking establishment within sixty-five miles of *London*, and in fact for the purpose of establishing a banking establishment in *London*.

That such persons held out to the public, that their intention was to establish a bank of deposit only, under the

the express terms of the restriction contained in the act of the 3 & 4 *W.* 4.; and that on the 23d of *August* 1833, they issued forth a printed prospectus of the object of their proposed copartnership, which was partly as follows: — "His Majesty's government having declared the law to be, that no obstructions exist to impede the formation of banks of deposit with an unlimited number of partners, it is universally considered that a joint stock bank of deposit should be established in *London* and *Westminster*, with such an extent of capital as will insure the perfect confidence and security of depositors, and the greatest practical accommodation and assistance to trade and commerce. It is proposed that the bank shall be designated 'The *London* and *Westminster* Bank,' and that the establishment shall be forthwith formed in the city, and for the accommodation of the public, a branch bank shall be simultaneously established at the west end of the town. It will be in the discretion of the directors, under the deed of constitution, to establish other branches where it may be deemed expedient. The capital shall be 10,000,000*l.*, divided into 100,000 shares of 100*l.* each: the deed of constitution will contain all the usual and necessary clauses." And the prospectus stated who were the then present committee of the proposed banking establishment.

The bill proceeded to state, that a great number of persons agreed to associate themselves with the persons issuing the prospectus, and that in *December* 1833, a company or partnership consisting of such great number of persons was formed, and that such company carried on the trade or business of banking in *London*, under the style or firm of the *London* and *Westminster* Bank, and that the Defendants were partners or shareholders in such company.

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That on the 26th of *December* 1833, the said company caused an advertisement to be published as follows: — "*London* and *Westminster* Bank. Capital 5,000,000*l.* in 50,000 shares of 100*l.* each. Directors *Samuel Anderson*, Esq. *Henry Bosanquet*, Esq. &c., (all of whom were Defendants). The directors will continue to receive applications for remaining shares at 39. *Great Winchester Street*, and at 9. *Waterloo Place*, *Pall Mall*, till the 15th of *January* next. The deed of settlement effectually limits the liability of shareholders, a clause being inserted that in the event of the remote contingency of a third of the paid up capital being lost, the company shall be dissolved by order of the board. *James W. Gilbert*, Manager."

The bill then alleged that the Plaintiffs had discovered that the real object of the said company or partnership was not only to carry on the business of a bank of deposit under the authority of the said act, but to borrow, owe, and take up money on their bills or notes at a shorter date than six months from the issuing thereof in violation of the privileges of the Plaintiffs; and as evidence thereof the bill alleged that, by the deed of copartnership of the said company, called the deed of constitution, to which deed the shareholders were parties of the first part, and the trustees of the second part, it was provided that only persons authorised by the directors should sign bills and notes, and other negotiable securities, and that there should be power to the company to issue notes payable on demand within his Majesty's dominions, if, and when, and wherever the law permitted.

That the said company, on its formation, established a house for the purpose of carrying on the trade or business of banking in *Throgmorton Street* in the city of

of *London*, and at the same time established another house for the same purpose in the liberties of *Westminster*. That the management of all the affairs of the company was in the board of directors for the time being, and that such directors chose three or more trustees in whose names contracts were made, which trustees and all other persons employed in the affairs of the company acted under the control of the directors; that the Defendants, thereinafter named, formed the board of directors, and that they were all parties and shareholders in the company, and that the other shareholders were so numerous, and the shares so fluctuating, that it was impossible, even if the Plaintiffs could discover such shareholders, to make them parties to the suit.

That in or about the month of *August* 1834, the Defendant, *George Alfred Muskett*, a shareholder in the *London* and *Westminster* Bank, opened an office in the town of *St. Albans*, which is within twenty-three miles from *London*, with a view to carry on the business of banking, and that he represented that his bank was opened in connection with the *London* and *Westminster*, and that he had issued notes payable to bearer on demand for the sum of 5*l.* and upwards, which notes were made payable by the *London* and *Westminster* Bank.

That the Defendant, *George Alfred Muskett*, had drawn divers bills of exchange and promissory notes, payable at a less time than six months from the date thereof, upon the *London* and *Westminster* Bank; which bills had been accepted by the said company, and that several bills and notes had been drawn and negotiated with a view to maintain a circulation of paper for the benefit of the *London* and *Westminster* Bank.

That,

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That, on the 21st of *February* 1835, *George Alfred Muskett* drew or caused to be drawn a bill of exchange of the same date upon the said company as follows: — "No. 383. Bank of *St. Albans* post-bill 21st *February* 1835. To the *London* and *Westminster* Bank, *Throgmorton Street:* Twenty-one days after date pay to the order of *W. J. Robertson*, Esq. the sum of 25*l.*, and place the same to account for the Bank of *St. Albans*. *Henry Edwards.*"

That such bill of exchange was presented at the house of the company in *Throgmorton Street*, and accepted by the directors on behalf of the company as follows: — "Accepted at 38. *Throgmorton Street* per procuration of the trustees of the *London* and *Westminster* Bank. *J. W. Gilbert*, Manager."

That the said company were constantly in the habit of borrowing, owing, and taking up in *England* sums of money on their bills or notes payable on demand or at a less time than six months from the borrowing thereof; and particularly that they had accepted bills of exchange and promissory notes for various sums of money, payable at a less time than six months from the date thereof, drawn upon them by various bankers and other persons; that they had received sums of money from persons willing to lend the same to the company for the space of three months certain, which loans were called deposits, and the company allowed interest on the sums so borrowed by them, and issued receipts or notes for the money so lent and advanced; and that such receipts or notes were negotiable and transferred from one person to another, and were paid by the company to the holder on being indorsed by the person to whom such receipts or notes were first issued; and that the company also received money from persons desiring letters of credit, and

and undertook and agreed with such persons that they might draw bills of exchange upon the company payable in less than six months from the receipt of the money, and that the company would accept such bills and pay the same when they came to maturity; and that many persons had drawn such last-mentioned bills of exchange upon the company payable in less than six months from the date thereof, and that the company had accepted and afterwards paid the same.

The bill alleged that the company had made great gains and profits by such course of dealing in violation of the privileges of the Plaintiffs; and it charged that, but for such course of dealing, the bills of exchange and promissory notes accepted by the company would have been drawn upon the Plaintiffs, and that the Plaintiffs would have made gains and profits by receiving commission for accepting the same, or otherwise. It charged, that the company had an interest in the bank of *St. Albans*, carried on by *George Alfred Muskett*, and in the gains and profits made thereby; and it prayed that an account might be taken of all bills of exchange and promissory notes, accepted or caused to be accepted by the Defendants for or on behalf of the company, payable at a less time than six months from the date thereof, and of the gains and profits of the company made by receiving commission for accepting the same or in any other manner; and that the Defendants might be decreed to pay the amount of such gains and profits to the Plaintiffs. And that the Defendants might be restrained, during the continuance of the privileges granted to the Plaintiffs, from accepting or causing to be accepted, on behalf of the company, any bill or bills of exchange or promissory notes payable at a less time than six months from the date thereof, and from borrowing, owing, or taking up in *England* for and on behalf

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of the company, and from authorising any person to borrow, owe, or take up in *England*, for and on behalf of the company, any sum or sums of money on the bills or notes of the company payable on demand, or at any less time than six months from the borrowing thereof. And that *George Alfred Muskett*, and that each and every partner in or shareholder of the company might in like manner be restrained.

To this bill all the Defendants, except *George Alfred Muskett*, put in a joint and several answer wherein they stated that, previous to the year 1693, there was no general or public bank established in this country, although long previous to that time public banks had been established in several of the larger cities of *Europe*. That such banks were public establishments, enjoying privileges conferred upon them by the governments of the countries in which they were established; and the greater part of them had, at different times, advanced monies at interest to their respective governments, and had thereby become possessed of a perpetual transferable fund of interest; and some of such banks also, upon the credit of their capital, issued bills or notes, which formed part of the currency in the countries where such banks were situate. That, in the year 1693, a plan was formed for establishing in this country a public general bank upon the model of the public banks then existing in other parts of *Europe*, and that the objects intended to be carried into effect by the establishment of such bank, were to assist the government by advancing a large sum of money at interest, which was to constitute the stock or capital of the bank, and thereby to create a public transferable fund of interest, and also to establish a paper circulation in this country by means of sealed bills or notes, to be issued by the bank on the credit of their

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their stock or capital. That this plan was sanctioned and adopted by the government, and that, for the purpose of carrying such plan into effect, the act of the 5 & 6 *W. & M. c.* 20. was passed, whereby power was given to their Majesties to incorporate the subscribers and contributors to the sum of 1,200,000*l.* towards the carrying on the war against *France*, by the name of the Governor and Company of the Bank of *England*. That by the twenty-seventh section of the said act, it was provided that the corporation should not deal or trade with the monies belonging to the corporation in the buying or selling of goods or merchandise; but by section 28. they were not to be prohibited from dealing in bills of exchange, or from buying and selling bullion, gold or silver, or from selling any goods deposited with them. And by sect. 29. it was enacted that all bills obligatory and of credit under the seal of the corporation given to any person or persons might, by indorsement, be assignable, *toties quoties*, and that such assignment should transfer the right and property in such bills obligatory and of credit, and the monies due thereon. That the Governor and Company of the Bank of *England* were incorporated in pursuance of the said act, and that they began to circulate their own sealed bills, and cash notes upon the credit of their capital, as authorised by the act, and that such sealed bills at that time bore interest, but such cash notes did not bear interest. That the sealed bills of the Governor and Company, which were so issued by them, and which were the bills intended by the said act, were single bills under their common seal, whereby they acknowledged that they were indebted to a person named therein to the sum of money mentioned therein, and promised to pay such sum to such person, his executors, administrators, or assigns, on a day therein mentioned, with interest in the meantime at the rate expressed in the bill. That the cash notes which were so issued by the

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Governor and Company, and which were the notes intended by the act, were promissory notes signed by an agent of the Governor and Company for a sum of money therein mentioned, payable on demand in the form of the bank notes at present issued. That in the years 1694 and 1695, projects were set on foot for establishing other banks, and for circulating notes of hand and bills of credit, but that such projects did not succeed. That among such projects was one for establishing a new national bank, to be called The National Land Bank, the object of which was to assist the government by the loan of the sum of 2,564,000*l.*, which was to be subscribed as a capital, and to procure the circulation of a large quantity of paper money, by enabling such bank, when so formed, to issue their sealed bills and notes upon the credit of landed security. That an act of parliament was passed in the 8 & 9 *W.* 3. for establishing and incorporating such projected National Land Bank; but that, in consequence of a sufficient sum of money not having been subscribed within the time appointed by the act, the project was not carried into effect. That in the year 1697, the Bank of *England* was in considerable pecuniary difficulties, and that their sealed bills and cash notes were at a very great discount, and that, in order to meet such difficulties, the act of the 8 & 9 *W.* 3. *c.* 20. was passed. That, after the passing of the last-mentioned act, the Governor and Company of the Bank of *England* continued to issue sealed bills and cash notes under the authority of the said act, in the same manner as they had theretofore done under the first-mentioned act. That in the year 1704, a charter of incorporation was granted to certain persons by the name of the Governor and Company of the Mine Adventurers of *England;* that this corporation, soon after its creation, erected itself into a money bank, and issued their sealed bills and cash notes in the same manner as was

was done by the Bank of *England*. That these bills and notes got into extensive circulation, and that by the failure of the company, and the stoppage of the payment of their bills and notes, great and extensive distress was occasioned. That for the purpose of preventing the recurrence of such mischief, the act of 6 *Ann. c.* 22. was passed, whereby it was enacted that it should not be lawful for any body politic or corporate, other than the Bank of *England*, or for other persons united, or to be united in covenants or partnership exceeding the number of six persons in *England*, to borrow, owe, or take up money on their bills or notes payable at demand, or any less time than six months from the borrowing thereof.

The answer proceeded to state the belief of the Defendants that by the bills or notes mentioned in the last stated act, were meant and intended bills obligatory or notes of such corporations and copartnerships which were issued and circulated by them for money borrowed, of the nature and description of the bills obligatory, and notes which were then issued and circulated by the Bank of *England;* and that, by the said enactment, it was only meant and intended to prevent corporations, other than the Bank of *England*, and partnerships from undertaking to deal in that part of the business of the Bank of *England*, which consisted in issuing their own notes or bills obligatory for money borrowed, and thereby to prevent such corporations and partnerships from infringing the exclusive privilege which it was intended to give to the Bank of *England;* and that it was not intended to restrain any other operation of banking whatsoever, nor in any manner to prevent corporations, or other persons connected in partnership, although exceeding the number of six persons, from accepting bills of exchange or orders for

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the payment of money which were not accepted for money borrowed by the corporation or persons so accepting the same, although such bills of exchange or orders might be payable within a less time than six months from the time when they were so drawn or accepted. That in all the different acts for continuing the privileges of the Bank of *England* from the act of the 6 *Ann. c.* 22. to the act of 39 & 40. *G.* 3., the prohibition to any corporation other than the Bank of *England* or other persons connected in partnership exceeding the number of six, has always been enacted by clauses similar to that contained in the act of the 6 *Ann. c.* 22., and that the mischief intended to be prevented by such prohibition was the mischief intended to be prevented by the enactment of the 6 *Ann.*

That for many years before the year 1825, the circulation of notes of the Bank of *England* had been confined to *London* and the neighbourhood, with the exception of some few parts of the country where they were also circulated, to the exclusion of the notes of private bankers; and that, in all other parts of *England*, the paper money in circulation consisted chiefly, if not entirely, of notes issued by private bankers. That, owing to the exclusive privilege, which had been given to the Bank of *England*, of being the sole bank of issue in *England* consisting of more than six persons, a great number of the provincial banks which issued notes prior to and in the year 1825, had been established without sufficient capital. That in the latter end of the year 1825, many of the provincial banks whose notes passed as paper money, and had a very extensive circulation, stopped payment, and became bankrupt or insolvent, whereby great mischief, loss, and ruin, were occasioned; and that in order to prevent the recurrence of this mischief, and in order to enable the establishment of banks of issue

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issue of more stable credit, the government, with the consent of the Bank of *England*, determined to make a change of the law limiting the number of partners in banks of issue to six persons only, and to authorise the establishment of banks of issue, consisting of any number of persons, in any part of the country beyond sixty-five miles from *London*, and that for carrying such intention into effect the act of the 7 *G.* 4. was passed.

That by the 3 & 4 *W.* 4. *c.* 83., it was enacted (*s.* 2.), that it should be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, carrying on business as bankers, to make any bill of exchange or promissory note of such corporation or copartnership payable in *London* by any agent of such corporation or copartnership in *London*, or to draw any bill of exchange or promissory note upon any such agent in *London*, payable on demand or otherwise in *London*, and for any less amount than 50*l.*, any thing in the act of the 7 *G.* 4. or in any other act to the contrary notwithstanding.

That the prohibitory words in the act of the 3 & 4 *W.* 4. *c.* 98., whereby it was provided that any body politic or corporate, or partnership, consisting of more than six persons, who should carry on the trade or business of banking in *London*, or within sixty-five miles thereof, should not borrow, owe, or take up in *England* any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof, were not intended to operate, and cannot be construed to operate in a different or more extended sense, than the prohibitory words used

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in the 6 *Ann. c.* 22. and the subsequent acts, which were intended only to restrain bodies politic, and partnerships exceeding six persons in *London*, or within sixty-five miles thereof, from issuing their own bills or notes only for money borrowed, as in the act of the 6 *Ann. c.* 22. That long before the act of the 3 & 4 *W.* 4. *c.* 98., the Bank of *England* had ceased to issue sealed bills, and had confined the issue of bills and notes to the issue of their bank notes, payable to bearer on demand, and the bank post bills payable at divers days after date or sight, to the order of the person therein named, in the form in which such bank notes and bank post bills were now issued. That by the last-mentioned act, the legislature intended to permit, and did permit, any corporation or any number of persons, though exceeding six in number, to establish a bank, and to carry on all the business of banking, either in *London* or within sixty-five miles thereof, provided that such bank was not a bank of issue, and did not issue their own bills obligatory, or notes as a bank of issue, and that the legislature did not intend to prohibit, and did not, by the said act or otherwise, prohibit any bank or banking company, which should be established under the authority of that act, in *London* or within sixty-five miles thereof, from accepting bills of exchange or orders for the payment of money, which were not accepted for money borrowed by co-partners or persons so accepting the same, although such bills of exchange or orders should be payable at a less time than six months from the drawing or accepting the same; and that, in fact, it was not by the said enactment, intended to restrain any corporations or other persons connected in partnership together, although exceeding the number of six persons, from accepting any bills of exchange or orders of other persons, drawn upon them for the payment of money, although

although such bills or orders might be payable within a less time than six months from the time when they were so drawn or so accepted.

The answer then admitted, that the *London* and *Westminster* Bank was established in the manner stated by the bill, and it set forth the deed of constitution of the company, dated the 3d of *July* 1834. It admitted that the company consisted of 400 persons and upwards; it stated that the real object and design of the company was to carry on the business of a bank of deposit upon the terms therein stated, as they were authorised to do by the last-mentioned act of parliament; and it denied that it was the object or design of the company to borrow, owe, or take up money on their bills or notes, at a shorter date than six months from the issuing thereof, in violation of the prohibition of the said act.

The answer proceeded to state that, since the filing of the bill, the Defendants had been informed and believed, that in the month of *August* 1834, *George Alfred Muskett* commenced business as a banker, on his own private account, in the town of *St. Albans*. That the Defendant *Muskett* had, ever since he commenced business, issued, and continued to issue, notes payable to bearer on demand for sums of *5l.* each and upwards, and that such notes were payable not only at *St. Albans*, but at the *London* and *Westminster* Bank, who were the *London* agents of the Defendant *Muskett*. That the Defendant *Muskett* kept a banking account with the *London* and *Westminster* Bank, in the same manner as the other customers of the bank; that he drew out monies belonging to him in the hands of the *London* and *Westminster* Bank, by his checques, and also by his own notes, made payable at the said bank, and also by his

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his bills of exchange drawn upon the said bank; and that he had drawn upon the said bank many bills of exchange, which were payable at a less time than six months from the date thereof, and that all such bills of exchange had been accepted by the trustees of the *London* and *Westminster* Bank and had been paid by the said bank when due. But the Defendants said that none of such bills were accepted by or on account of the *London* and *Westminster* Bank for monies borrowed by the said bank; and that none of them were bills of the *London* and *Westminster* Bank, but that they were all the bills of the Defendant *Muskett*, and that the acceptance of such bills by the *London* and *Westminster* Bank, did not render them the bills of the company within the meaning of the prohibition in the before-mentioned acts of parliament. The Defendants denied that *Muskett* had drawn upon the *London* and *Westminster* Bank promissory notes payable at less than six months from the date thereof, or any promissory notes whatever. They admitted that *Muskett* had, on the 21st *February* 1835, in the ordinary course of his business, drawn the bill of exchange in the bill mentioned, and that such bill of exchange was presented at the house of the *London* and *Westminster* Bank in *Throgmorton Street*, and was, for and on behalf of the company, accepted by *James William Gilbert*, the manager of the *London* and *Westminster* Bank; but they said that the said bill was not accepted by or on account of the said company, for monies borrowed by the company, and that the bill was not the bill of the company, but the bill of *George Alfred Muskett*, and that the acceptance thereof by the *London* and *Westminster* Bank did not render it the bill of the company within the meaning of the prohibition in the before-mentioned acts of parliament.

The

The Defendants denied that they had ever borrowed any money whatever on their bills or notes, payable on demand, or at a less time than six months from the borrowing thereof. They admitted that the directors of the company had, from time to time, and continually since the formation of the partnership, accepted and caused to be accepted, bills of exchange for and on behalf of the company, at a less time than six months from the date thereof, drawn upon them by different bankers and other persons in the country; but they said that none of such bills of exchange were accepted for monies borrowed by the company, and that the bills were not the bills of the *London* and *Westminster* Bank, but the bills of the persons drawing the same; and that the acceptance of such bills by the *London* and *Westminster* Bank did not render them the bills of the company within the meaning of the acts of parliament.

That the directors of the company never accepted any promissory notes whatever. That, as part of the business of the banking establishment, the company received sums of money from persons willing to deposit the same with the company, either on a current account or as permanent lodgments; and that, for the money deposited on a current account, they gave receipts if required, but allowed no interest; and that, for the sums of money deposited as a permanent lodgment they allowed interest, provided such sums were not withdrawn within three months, or such other time as might be agreed upon with the parties depositing the same, and that they gave receipts to the depositors; but they denied that such deposit receipts were negotiable or transferred from one person to another as negotiable notes, for it was the habit of the company never to repay the money for which such deposit receipt had been

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been given except to the depositor personally attending to receive the same, or to some person or persons to whom the depositor should give an order to receive the same, distinct from the deposit receipt. They denied that they received loans which were called deposits, as in the bill alleged; but they admitted that, in the usual course of business with their customers they received money from persons desiring letters of credit, and that they gave such letters of credit in the usual manner.

The Defendants admitted that *George Alfred Muskett* held fifty shares in the *London* and *Westminster* Bank, but denied that he was in any other manner connected with the said company, or that the company had any control over, or connection whatsoever with, the *St. Albans* bank, except that they acted as the *London* agents of the said bank.

The separate answer of the Defendant *George Alfred Muskett* was substantially to the same effect as the answer of the other Defendants.

March 22, 23, 24.

A motion was now made, on the part of the Plaintiffs, for an injunction to restrain the directors of the *London* and *Westminster* Bank from accepting or causing to be accepted for or on behalf of the said company or partnership, and from authorising any one to accept for or on behalf of the said company, any bills or bill of exchange, promissory notes or promissory note, payable at a less time than six months from the date thereof, and from in any other manner borrowing, owing, or taking up in *England*, for or on behalf of the said company or partnership, or from authorising any person to borrow, owe, or take up in *England*, for or on behalf of the said company, any sum or sums of money on the bills or notes

notes of the said company or partnership, payable on demand, or at any less time than six months from the borrowing thereof.

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Sir *Frederick Pollock*, Mr. *Wigram*, Mr. *Phillimore*, and Mr. *Griffith Richards*, in support of the motion.

This application is founded upon the right which the Bank of *England* claims to exercise the exclusive privileges which have been secured to them by successive acts of parliament — privileges, the possession of which is necessary to enable that corporation to perform its important functions, and the protection of which is no less essential to the public interests with reference to the due preservation of a circulating medium in which the commercial world and the country at large may confide. The Bank of *England* was founded in the year 1694 by a charter of incorporation granted in pursuance of the act of the 5 & 6 *W. & M. c.* 20., by which act they were empowered to borrow or give security by bill, bond, covenant or agreement under their common seal for the sum of 1,500,000*l.*, being the amount of the sum advanced by the Bank by way of loan to the government. The twenty-ninth section of the act provides that "all and every bill or bills, obligatory and of credit, under the seal of the said corporation, made or given to any person or persons, shall and may, by indorsement thereon, under the hand of such person, be transferred, and the person to whom they are transferred, may sue in his own name." Shortly after the incorporation of the Governor and Company of the Bank of *England*, it became apparent that it would be necessary to give them protection against the rivalry and interference of other banking establishments; and, accordingly, by the 8 & 9 *W.* 3. *c.* 20., it was provided "that, during the continuance of the Governor and Company

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Company of the Bank of *England*, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, should be erected, or established, permitted, suffered, countenanced, or allowed by act of parliament within this kingdom." This enactment was an engagement on the part of parliament that the Bank of *England* should be the sole national bank, and that no rival establishment should be permitted to interfere with its exclusive privileges. The next statute is the 6 *Ann. c.* 22., in which a clause was introduced for the first time, by way of further protection to the Bank of *England*, upon which the present question arises. That act, after reciting the 8 & 9 *W.* 3. *c.* 20., and that, notwithstanding the provisions in that act contained, "some corporations, by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds and covenants united together, had presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, did deal as a bank, to the apparent danger of the established credit of the kingdom," proceeds to enact, for preventing such practices in time to come, and the mischiefs thence to arise, during the continuance of the Governor and Company of the Bank of *England*, "That it shall not be lawful for any body politic or corporate whatsoever, erected or to be erected, other than the said Governor and Company of the Bank of *England*, or for other persons whatsoever, united or to be united in covenants or partnership exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof." That clause is repeated in all the subsequent acts where the object has been to renew or confirm the privileges of the bank. By the acts

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acts of the 7 *G.* 4., and the 3 & 4 *W.* 4. *c.* 98., certain modifications of the exclusive privileges granted to the Bank of *England* were, with the consent of that corporation, made by the legislature. By the first of those statutes, partnerships, consisting of more than six persons, provided their banking establishments were at a distance of more than sixty-five miles from *London*, were permitted to carry on the business of banking; but still on certain conditions, by one of which the exclusive privilege now in question is saved and confirmed to the Bank of *England*. By the latter statute, the liberty of carrying on the business of banking, by partnerships consisting of more than six persons, is further extended to *London* and places at any distance from *London*, provided always that they do not attempt to interfere with the exclusive privilege of the Bank, — "that they do not borrow, owe, or take up money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof."

Under the provisions of these acts, the Defendants established the bank, called the *London* and *Westminster* Bank. On the 21st of *February* 1835, they accepted a bill of exchange for the sum of 25*l.*, drawn by *Henry Edwards*, the clerk of *George Alfred Muskett*, who carried on business as a banker at *St. Albans*, under the firm of the Bank of *St. Albans*, and payable to the order of *W. J. Robertson*, twenty-one days after date. The distance of the bank of *St. Albans* from *London* is twenty-two miles; and the question is, whether this is not a violation of the exclusive privilege granted to the Bank of *England* by the statute of the 6 *Ann.* *c.* 22., and continued to the bank by successive acts of parliament down to the 3 & 4 *W.* 4. *c.* 98.

Three grounds of defence are raised by the answer, and will be relied upon by the Defendants. First, it is to

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to be insisted that, provided the Defendants do not interfere with the privileges of the Bank of *England*, as a bank of issue, they have a right to act as a bank of deposit, and that the accepting of bills of exchange is a part of the ordinary business of a bank of deposit; that there is nothing in the restrictive clause in the acts to restrain the Defendants from accepting bills of exchange, payable at any date, and that the bill in question was the bill of the person by whom it was drawn, and consequently not *their* bill within the meaning of the 6th of *Anne*. Secondly, it will be contended, that by the word "bills" in the 6 *Ann.*, and in the subsequent acts, bills of exchange were not intended. Thirdly, which is the argument mainly to be insisted upon, it is said that the transaction between the *London* and *Westminster* Bank and the bank of *St. Albans* did not constitute a "borrowing" within the meaning of the act.

As to the first ground of defence, we admit that the Defendants have a right to act as a bank of deposit, provided they do not interfere with the privileges of the Bank of *England*, but it is obvious that bills of exchange, payable at a short date, accepted by an opulent joint stock banking company in *London*, are liable to get into extensive circulation, and interfere directly with the privileges of the bank as an exclusive bank of issue. If, therefore, the accepting of such bills by such a banking establishment were not expressly prohibited, it is within the mischief intended to be provided against, and therefore within the enactment. As to the suggestion in the answer, that the bill accepted by the *London* and *Westminster* Bank, was the bill of Mr. *Muskett*, and not the bill of the acceptors, it is the acceptor, not the drawer, who is primarily liable to pay a bill of exchange; the debt is the debt of the acceptor, not of the drawer. It is a fallacy, therefore, to say that the bills accepted

accepted by the *London* and *Westminster* Bank are not, as well in law as for all substantial and commercial purposes, *their* bills. It is upon their responsibility that they are issued into the world; all the credit, which, from its numbers and its capital, belongs to this new banking establishment would be given to these bills; and if drawn at a few weeks or days from the date, they might easily, and indeed would necessarily come into some competition with the circulating medium, which the bank is alone empowered to issue within the distance of sixty-five miles from *London*. It is impossible, therefore, to contend successfully that this transaction is not a direct infringement of the exclusive privilege of the bank.

As to the sense in which it is attempted by the answer to shew that the word "bills" must be confined in the act of *Anne* and the subsequent acts, the construction contended for by the Defendants is founded upon the circumstance of the Bank of *England* having for a short period issued bills, known by the name of "sealed bills," which were payable at a short date, and bore interest. Such bills have not for many years been seen or heard of; and, even if it could be shewn that these were the bills contemplated by the legislature in the prohibitory clause of the 6th of *Anne*, it is evident that they could not be the subject of legislative provision in the more recent statutes. But bills of exchange were well known before the 6th of *Anne;* why, then, should they not be included under the word "bills," a word of very comprehensive signification, and applicable to a great variety of objects? That bills of exchange were not excluded, but that it was intended in the prohibitory clause to include both bills of exchange and promissory notes, may be inferred from this circumstance, that shortly before the passing of the act in which the prohibition is first introduced, and by the 3 & 4 of *Ann.*

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c. 9., promissory notes, which were not legally assignable by indorsement, were put upon the same footing as inland bills of exchange. Can it admit, therefore, of any reasonable doubt, that the words "bills or notes" in the 6th of *Anne* were intended to apply to bills of exchange and promissory notes?

As to the third ground of defence, namely, that the acceptance of a bill of exchange is not a "borrowing," and that, consequently, the *London* and *Westminster* Bank were not, from the moment of acceptance, debtors upon the bill drawn by the *St. Albans* Bank, this point has been determined by the Court of King's Bench in the case of *Broughton* v. *The Manchester Water Works Company.* (*a*) In that case the defendants, who were a company incorporated for the purpose of supplying the towns of *Manchester* and *Salford* with water, had accepted a bill of exchange for 200*l.*, of which the plaintiffs were the indorsees, payable at three months from the date; and one of the questions was, whether this acceptance by a corporation was not a violation of the 6 *Ann. c.* 22. *s.* 9., and the other acts by which the Bank is protected, and which contain the same prohibitory clause. The Court was of opinion that it was. Lord *Tenterden*, then Chief Justice *Abbott*, after citing the clause in the 6th of *Anne*, says, "That clause has been incorporated into all the subsequent acts relating to the Bank of *England*. It seems to me that, by the fair interpretation of that statute, the words 'owe on a bill of exchange' are applicable to those who are liable as acceptors; for such persons are debtors on the bill. In the case of the bankruptcy of an acceptor, the holder of the bill proves the amount as a debt under the commission, and makes an affidavit that the bankrupt is indebted upon

(*a*) 3 *B. & Ald.* 1.

upon the bill. It seems to me that we should be defeating the object of the statutes, if we were to hold that the *Manchester* Water-Works Company could bind themselves by the drawing of bills of exchange, or by the issuing of promissory notes." Mr. J. *Bayley* and the other Judges concurred in this view of the case; and they distinguished the case from *Wigan* v. *Fowler* (*a*), on the ground that it did not appear in that case, on the face of the instrument, that the bill was accepted by more than six persons. In *Wigan* v. *Fowler* Lord *Ellenborough* certainly did intimate an opinion that the protection given to the Bank by the clause in the 15 *G.* 2. *c.* 13., and the other acts prohibiting the borrowing of money by more than six persons, on their bills or notes, payable at a shorter date than six months, extended only to banking companies, and not to copartnerships consisting of persons engaged in trades other than the business of banking. But *Wigan* v. *Fowler* was a case at *nisi prius;* and the opinon intimated by Lord *Ellenborough* was not necessary to support the conclusion to which he came, the action being incapable of being maintained upon another ground. It is not necessary that there should be a "borrowing," if the transaction otherwise amounts to an infringement of the exclusive privileges of the Bank. Thus in *Ex parte Randleson* (*b*), where a partner in the *Leith* banking company opened an office at *Carlisle*, and circulated there promissory notes drawn by the company's cashier in *Scotland*, and made payable to the bearer on demand at the company's office in *Leith*, it was held that this was a violation of the statutes passed for the protection of the Bank of *England*, and that a debt founded on notes so issued could not be proved under the commission. Here there was no "borrowing," because the notes were payable on demand.

(*a*) 1 *Stark.* 459. (*b*) *Mont. & M'Arth.* 86.

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mand. So in *Slark* v. *The Highgate Archway Company* (*a*), where the Defendants made a promissory note at two months for the accommodation of the payee, and there was, in fact, no borrowing, the effect of the decision of the Court of Common Pleas was, that the transaction fell within the prohibitory clause in the Bank Acts.

If the construction contended for by the Defendants be right, it is certain that the Bank of *England* has never had any protection against other corporations and copartnerships, consisting of more than six persons, from the passing of the 6th of *Anne* to the present moment; and that there has been nothing to prevent any number of persons from constituting themselves a bank of issue by accepting bills, payable at any time, however short, from the date thereof, which might afterwards pass from hand to hand to any extent, and so form part of the circulating medium of the country. But besides the word "borrow," there are the words "owe or take up." Now the person accepting a bill of exchange *owes* the amount of the sum for which the bill is drawn from the moment of acceptance. It may be said that the word "borrowing" occurs alone in the latter part of the clause; but the words "owe or take up," which occur in the previous part of the sentence, are evidently implied; and the sentence must be understood as if the words were "at any less time than six months from the borrowing, owing, or taking up thereof." What is the meaning of the word "borrowing," as contradistinguished from owing or taking up? If we can fix the legal meaning of the word "loan," or lending, we shall have a clue to the meaning of the word "borrowing;" for wherever there is a lending there must be a borrowing. Now

(*a*) 5 *Taunt.* 792.

Now the word *loan* is the emphatic word used in the statute 12 *Anne*, *st.* 2. *c.* 16., by force of which usurious contracts are made void; so that wherever there is usury within that statute there is a loan, and wherever there is a loan there is a borrowing. If the money or effects of one man pass into the hands of another, and that other pay more than 5 per cent. interest for forbearance, there is a loan within the meaning of this act, and by no device or ingenuity can the parties elude its provisions. If the *St. Albans* Bank has 100*l.* in the hands of the *London* and *Westminster* Bank, and draws a bill upon that bank for 25*l.*, this transaction constitutes, in point of law, a lending of money. The bill becomes the property of the *St. Albans* Bank or the indorsee, and the money becomes the property of the *London* and *Westminster* Bank, which it is entitled to hold till the bill becomes due. It is a loan of the 25*l.* to the *London* and *Westminster* Bank; and where there is a lending there is a borrowing. The case of *Sims* v. *Bond* (*a*) is a direct authority to shew that sums of money which are paid to the credit of a customer with a banker, though usually called deposits, are, in fact, loans to the banker. In that case, *A.*, one of the part-owners of a vessel to whom warrants of the *East India* Company to pay the freight to the owners or bearer had been intrusted by the other part-owners, deposited the warrants in the hands of his bankers, in order that they might receive the money and place it to his banking account. The bankers did so; and, after the death of *A.*, the surviving part-owners sought to recover the amount of the proceeds of the warrants against the bankers; but it was held, that the transaction was the loan of *A.* to the bankers, and that there was no privity of contract between the surviving part-owners and the bankers.

(*a*) 5 *B. & Ad.* 389.

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bankers. In *Carr* v. *Carr* (*a*), and in *Clayton's Case* (*b*), the same principle is recognised. When the *London* and *Westminster* Bank, therefore, accepted the bill drawn upon them by the *St. Albans* Bank, *eo instante*, there was a lending by the *St. Albans* Bank, and consequently a borrowing by the *London* and *Westminster* Bank; for the terms loan and borrowing are correlative; and if the transaction had been tainted by usury—if more than 5 per cent. discount had been received upon the bill, there would have been a loan within the meaning of the 12 *Ann.*; and if a loan, there was a "borrowing."

The Master *of the* Rolls, at this stage of the argument, intimated that the question raised upon this motion was a purely legal question, which, considering the important consequences involved in its decision, could not be satisfactorily determined without the assistance of the opinion of a court of law at some period of the cause. Where the circumstances of a case were such as to require the interference of a court of equity without delay, the Court would itself decide upon a question of legal right, for the purpose of granting an injunction. Here, however, the case could not be said to be of a very pressing nature, the bill having been filed in *March* 1835, the answer filed in the month of *May* following, and notice to move for the injunction having been first given on the 20th of *July*.

On this suggestion, some discussion took place between the counsel for the Bank and the counsel for the Defendants, the result of which was that his Lordship directed the motion to stand over, in order to afford to the parties an opportunity of settling a case to be sent to the Court of Common Pleas.

The

(*a*) 1 *Mer.* 541. n. (*b*) *Devaynes* v. *Noble*, 1 *Mer.* 568.

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The following case was settled between the parties, and directed by the Master of the Rolls to be sent to the Court of Common Pleas.

The *London* and *Westminster* Bank is a co-partnership, consisting of more than six persons, united in covenants, carrying on in *London* all such parts of the business of banking as are usually carried on by *London* private bankers. Mr. *George Alfred Muskett* is a proprietor of shares in the said *London* and *Westminster* Bank, and became such by a purchase of shares from a former shareholder. Mr. *George Alfred Muskett* carries on business as a banker at *St. Albans*, which is a town within sixty-five miles of *London*, in the county of *Hertford*, on his own sole account, and is registered at the Stamp Office as the sole person interested in such bank, under the style and firm of the Bank of *St. Albans*. The said *George Alfred Muskett* keeps a banking account with the *London* and *Westminster* Bank, and the *London* and *Westminster* Bank act as the *London* agents of the said *George Alfred Muskett*, and receive and collect for him his *London* monies; place the same when received to his credit; and hold the same at his disposal, as *London* bankers usually do for their customers. The Bank of *St. Albans* has not any connection whatever with the *London* and *Westminster* Bank, except that the *London* and *Westminster* Bank act as the *London* agents of the *St. Albans* Bank. On the 21st of *February* 1835, one *W. J. Robertson* applied at the office of the said Bank of *St. Albans* for a bill of exchange on *London* for 25*l.*, and paid *Henry Edwards*, the clerk of the said *George Alfred Muskett*, the sum of 25*l.* for the same; and thereupon the said *George Alfred Muskett*, by the said *Henry Edwards*, his clerk, drew upon the said *London* and *Westminster* Bank a bill of exchange, and delivered the same to the said *W. J. Robertson*. The following is a copy of the said bill.

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"No. 383. Bank of *St. Albans* post bill, 21st of *February* 1835. To the *London* and *Westminster* Bank, *Throgmorton Street*. — Twenty-one days after date, pay to the order of *W. J. Robertson*, Esq., the sum of 25*l.*, and place the same to account.

"For the Bank of *St. Albans*,

"25*l.* "*Henry Edwards.*

"Ent. *H. E.*"

The said sum of 25*l.* was received by the said *George Alfred Muskett* on his sole account, and for his own use and advantage. The *London* and *Westminster* Bank did not pay or compound for the stamp duty on such bill; but the stamp duty on such bill was paid or compounded for by the said *George Alfred Muskett*. The said bill was, on the 23d of *February* 1835, presented to the said *London* and *Westminster* Bank for acceptance; and the same was accepted, by order of the directors thereof, as follows: —

"Accepted,

"At 38. *Throgmorton Street*, per procuration of the trustees of the *London* and *Westminster* Bank.

"*J. W. Gilbert*,

"Manager."

At the date of the presentation of the said bill for acceptance the said *London* and *Westminster* Bank had, as such *London* bankers of the said *George Alfred Muskett* as aforesaid, monies in their hands to an amount exceeding 25*l.*; and the said bill was accepted for and on account of the said *London* and *Westminster* Bank.

The question for the opinion of the Court was, whether the acceptance by the said *London* and *Westminster* Bank of the said bill was lawful, having regard

to

to the provisions of the act 3 & 4 *W.* 4. *c.* 98., and other acts passed, and now in force, respecting the Bank of *England.*

The case was argued in *Michaelmas* term, 1837. (*a*) The Court departed from the usual (though modern) practice of merely certifying their opinions, the grounds upon which the Court formed their opinions being stated, as follows, by Chief Justice *Tindal.*

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The case, which has been sent to us by the Master of the Rolls involves in its determination results of such general importance, that we have thought it right, not merely to certify our opinion to his Lordship in the ordinary way, but to state publicly the grounds and reasons on which such opinion has been formed.

The question is, whether a copartnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, can, by law, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of giving such acceptance; and we are of opinion, regard being had to the various statutes which relate to the Bank of *England*, that such an acceptance is not a lawful acceptance. In thus stating the question, we purposely insert, as one of its terms, that the acceptance is given in the course of the Defendants' trade or business as bankers; first, because such appears to us to be the necessary character of the transaction described in the case; and, secondly, because we are unwilling to embarrass

(*a*) See *Bingham's New Cases*, vol. iii. p. 589., where the argument is fully reported.

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embarrass the general question with the consideration of one of much less importance; namely, whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership, as bankers, but given in payment of their private debt, or for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restriction to which we shall afterwards more particularly advert, and which we consider under the several statutes to be still in force.

The question above stated depends for its answer upon the construction to be put upon the statute 3 & 4 *W.* 4. *c.* 98., the statute which is at present in force and operation; and the particular clause of the statute which bears upon it is sect. 3., by which it is enacted, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in *England* any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof."

These prohibitory words are found originally in the ninth section of the statute 6 *Ann. c.* 22., by which statute any direct restriction was for the first time imposed upon the rights of the public, in favour of the Bank of *England*. And, in order to determine the proper construction which is to be put on the words employed by the legislature in the statute of his present Majesty, it will be advisable to ascertain, in the first place, the intention of the legislature when the same restriction was originally imposed; and afterwards to consider,

consider, whether any of the subsequent statutes, passed from time to time for the renewal or confirmation of the privileges of the Bank of *England*, either throw any light upon the original intention of the legislature as to the extent of the restriction, or have by their own operation enlarged such extent.

The Bank of *England* was first established by the 5 & 6 *W. & M. c.* 20., which, by sect. 19., gave power to their Majesties, by letters patent, to incorporate the subscribers and contributors to the sum of money therein mentioned, by the name of the Governor and Company of the Bank of *England*. By two subsequent sections, the twenty-sixth and twenty-seventh, the corporation is prohibited from buying or selling any goods, wares, or merchandise, but not from dealing in bills of exchange, or from buying or selling bullion, gold, or silver, or goods deposited with them. This statute, however, does not confer any exclusive privilege whatever on the Bank beyond that given by the twenty-eighth section, namely, that of making their bills obligatory and of credit under the seal of the corporation, transferable, *toties quoties*, by indorsement under the hand of the holder, and allowing the assignee to sue upon the same in his own name; but the statute itself is altogether silent as to the intention of the legislature, whether the Bank, thereby empowered to be created, should be a bank of circulation and issue, or merely a bank of deposit. Under the powers of this statute the Governor and Company of the Bank of *England* were shortly afterwards made a body corporate by royal charter; and by the statute of the 8 & 9 *W.* 3. *c.* 20., which is the next in succession relating to the Bank, the stock of the company is allowed to be augmented and increased; and the first direct privilege is conferred upon the company, by enacting, in sect. 28., that, during the continuance of the corporation,

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tion, "no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament within this kingdom;" which words are explained in a later statute, 15 *G.* 2. *c.* 13. *s.* 5., to intend, "that no other bank shall be erected, established, or allowed by parliament." From this time no extension whatever of the privileges of the Bank took place, until the passing of the statute 6 *Ann. c.* 22., above referred to, when, in an act of parliament, the title to which embraces a variety of subjects of legislation having no relation to each other, and states, among the rest, that of "An Act for securing the credit of the Bank of *England*," the prohibition above referred to, upon the proper construction of which the present inquiry mainly turns, is first created by the legislature.

In the interval, however, between the incorporation of the Bank of *England* and the statute of *Anne*, that is, between the years 1694 and 1707, it is certain that the Bank had begun and continued to act as a bank of circulation and issue, and, probably, to a very considerable extent. This appears evident, as well from the language of the recital of the thirty-sixth section of the statute 8 & 9 *W.* 3. *c.* 20. above referred to, as from the enacting words of that section. The thirty-sixth section recites, "that divers frauds and cheats had been put upon the Governor and Company of the Bank of *England*, by the altering, forging, and counterfeiting of the Bank-bills and Bank-notes of the said Governor and Company, and by the razing and altering indorsements thereupon, to the great decay of credit." After which the clause then proceeds, "that for redressing the same for the future it is enacted, that the forging and counterfeiting the common seal of the corporation

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tion of the Governor and Company, or of any sealed Bank-bill made or given out in the name of the said Governor and Company, for the payment of any sum of money, or of any Bank-note of any sort whatsoever, signed for the said Governor and Company of the Bank of *England*, or the altering or razing any indorsement on any Bank-bill or note of any sort, shall be and is hereby adjudged to be felony without benefit of clergy." This clause affords an inference which seems undeniable; namely, that in 1697, when that statute was passed, the Bank of *England* was in the habit of issuing Bank-bills sealed and Bank-notes signed so largely, that the protection of such bills and notes from forgery was essential to the preservation and security of the public credit.

In this state of things the statute of *Anne* was passed. The clause in question begins by reciting the enactments of the before-mentioned statute, 8 & 9 *W.* 3. *c.* 20., by which it was provided that, during the continuance of the corporation of the Governor and Company of the Bank of *England*, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament within the kingdom; nevertheless, that, since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons by pretence of deeds or covenants, united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom;" and after this recital, the statute proceeds to provide the remedy in the terms following; namely, "that it shall not be lawful for any body politic or corporate whatsoever, erected

or

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or to be erected, other than the said Governor and Company of the Bank of *England*, or for other persons whatsoever, united or to be united in covenants or partnership, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof."

The great grievance, therefore, to which the statute of *Anne* intended to apply a remedy, was that of other corporations, and large numbers of persons united in partnership, contrary to the intent of the statute of *W.* 3., "presuming to deal as a bank;" that is, as a bank of circulation and issue; for merely dealing as a bank of deposit could scarcely "affect the credit of the Bank of *England*," the security of which credit is the object mentioned in the title of the act; still less could it operate "to the danger of the established credit of the kingdom," which is the effect of such dealing as described in the recital to the same section.

Such then being the grievance felt and described in the statute, the remedy, which the legislature would, *à priori*, be expected to apply, is some remedy co-extensive with the mischief itself; some enactment, which, if it did not in terms prevent persons united in a copartnership of more than a given number *from* "dealing as a bank of circulation" altogether, would at least impose such restraints and regulations upon their mode of dealing as a bank as would prevent them from coming into competition with the dealing of the Bank of *England*, by laying a sufficient check upon the issue of negotiable bills or notes, having the security of a large body of copartners, and made payable on demand, or at a very short time after their issue.

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Whatever was the extent of the restriction thus originally imposed by the statute of *Anne*, it is found to be repeated in all the subsequent statutes passed from time to time for the renewal or confirmation of the privileges of the Bank of *England*, if not in words precisely the same to the very letter, yet in words bearing precisely the same meaning; and it is for the last time inserted in the statute before referred to, the 3 & 4 *W.* 4. *c.* 98., as the proviso or condition upon the observance of which "any society or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof." And the question immediately before us is, whether this restriction is framed in such terms as to comprise within its limits and extend to the transaction stated in the case.

Upon the part of the Defendants, it is contended that the facts stated in the case do not bring the transaction within the restrictions of the statutes; and, as the three principal objections, which have been urged, are grounded upon the language used in the statute of *Anne*, we will consider them in their order.

In the first place, it is objected that the statute of *Anne*, using the term "bills" simply and without any addition, must be construed to intend "bills sealed or obligatory," or, as they are commonly termed, single bills; and that, by reference to the two former acts passed in the preceding reign for the establishment of the Bank of *England*, bills of exchange cannot be held to be included in the word "bills" without any addition.

In the second place, it is objected that no case can fall within the meaning of the restriction, unless where the transaction is such as to import "a borrowing" on the

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the part of the copartnership, which, as it is argued, cannot be said to exist on the present occasion.

And, thirdly, it is objected that, even if the Defendants can be held to have "borrowed" by accepting the bill, yet that they have not borrowed "on their bill," which is required by the statute.

With respect to each of these objections, it may be advisable, in order to discover the views of the legislature, to consider, first, the statute of *Anne* taken by itself; and, next, some of the subsequent acts passed *in pari materiâ*, in order to discover whether they throw any light upon the language originally employed in the first statute, or make any legislative alteration therein by subsequent enactment. And, with respect to the first objection, we think there must be considerable doubt as to the soundness of the construction contended for by the Defendants, when it is observed that the statute of *Anne* is not speaking, in the clause under consideration, of the bills or notes of the Governor and Company of the Bank of *England*, but of bills or notes of any other bodies politic or corporate, and of persons united in copartnership to a greater number than six. It is, therefore, no necessary inference that by "bills" the statute meant such bills only as the Bank of *England* were in the habit of issuing; but all other bills might equally be included. But again, the restriction relates to bills of persons in copartnership; but, as such persons can have no common seal, it would seem, to say the least of it, very improbable that the statute could have intended bills sealed with the several seals of a copartnership, consisting of persons exceeding the number of six to an indefinite extent; sealed bills by an indefinite number of private partners never having been heard of in the course of trade, certainly never as a medium of circulation;

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lation; the very necessity of proof of so many separate sealings (the law of *England* not allowing any one partner to seal for others under an implied authority) rendering the recovery on such instruments almost impracticable. Again, neither the bills sealed by other bodies corporate, or by copartners, were negotiable instruments, not being transferable by indorsement under the hand of the holder; the power given for transferring such sealed bills by indorsement being limited by the statute to the case of sealed bills of the Bank of *England*. To construe the restriction, therefore, as limited to sealed bills of copartners would be to legislate against a danger which could not by possibility exist.

Again, the manifest object of the restriction was to prevent the circulation of negotiable paper, of whatever description it might be, which might come into competition with the circulating paper of the Bank of *England*. To prohibit, therefore, the issue of such bills only as corresponded in precise form with those adopted by the Bank, and to permit the issue of bills of any other form, would have fallen short altogether of the object professed by the restriction; it would have conferred no advantage whatever on the Bank, nor any security to public credit. We therefore think, looking at the statute of *Anne* alone, the sounder construction is, that in using the general expression "bills or notes," it was the object of the legislature to comprise within the restriction all negotiable instruments which could fall in common understanding, at that time, within either of those denominations. And again, when it is further considered that, within three years before the passing of the statute of *Anne*, promissory notes and inland bills of exchange had been put by the legislature upon the same footing, we think the expression of "bills and notes" may, with more propriety of construction, be held to

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comprise bills of exchange, than be confined to bills under seal.

But in order to arrive at the meaning of the prohibition in the present statute 3 & 4 *W.* 4., which is borrowed from the statute 6 *Ann.*, the acts passed by the legislature *in pari materiâ*, between the two, may be referred to with great advantage. The question is, whether the expression "bills or notes," found in both those acts, is confined to bills sealed and promissory notes. The affirmative of that proposition is contended for by the Defendants, on the ground of the language employed by the legislature in the two earliest Bank acts. Do the subsequent acts bear out or impugn that construction? The statute which appears to us to throw the greatest light on the question is the 15 *G.* 2. *c.* 13. The fifth section of that act, which recites that it is passed "to prevent any doubts that may arise concerning the privilege or power given by former acts to the Governor and Company of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege," then proceeds to declare that it is the true intent and meaning of this act "that no other bank shall be erected, established, or allowed by parliament; and that it shall not be lawful for any body politic, &c., to borrow, owe, or take up any sum or sums of money on their bills or notes payable, &c., as stated in the statute of *Anne*. Now, in the twelfth section of the very same statute, the word "bill" requires manifestly the construction of a bill not under the seal of the company, but an ordinary bill of exchange. It is an enactment that, "if any officer or servant of the Company, intrusted with any note, bill, dividend-warrant, bond, deed, or any security, money, or other effects belonging to the said Company, shall embezzle any such note,

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note, bill, dividend-warrant, bond, deed, &c., such person shall be guilty of felony." It appears to us that the words "note" and "bill," when occurring without any addition in the twelfth section, must be held to mean not bills sealed only, but bills of exchange; and, if so, the same expression "bills or notes," occurring in the fifth section, which is expressly stated to have been passed to prevent any doubts as to the privileges given by former acts, must receive the same construction.

The statute next in order of time, to which reference may be made for the purpose before adverted to, is that of 7 *G.* 4. *c.* 46. By that statute, it is recited that the Bank of *England* had consented to relinquish so much of their exclusive privilege of banking as prohibits more than six persons in *England*, acting in copartnership, from borrowing, owing, &c., at a greater distance than sixty-five miles from *London*, under certain conditions therein specified. One of these conditions is stated in sect. 3. to be this, that such partnership do not borrow, owe, or take up in *London*, or within sixty-five miles thereof, any sum of money on any bill or promissory note of any such copartnership payable on demand, or at any less time than six months from the borrowing thereof, "nor make or issue any bill or bills of exchange or promissory note of such copartnership, contrary to the provisions of the recited act of the 39 & 40 *G.* 3." These last words plainly shew that bills of exchange are within some of the provisions of 39 & 40 *G.* 3.; but, upon reference to that statute, no words are found to comprehend them, except the expression so often adverted to, — "bills or notes."

The very same section further provides, that it shall not extend to prevent such copartnership (that is, a copartnership carrying on their business as bankers beyond

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sixty-five miles from *London*), by any agent, from discounting in *London* "any bill of exchange *not* drawn by or upon such copartnership, or by or upon any person on their behalf." Now the manifest object of the introduction of this negative, was to let it appear clearly to the world, that the circulation in *London* of bills of exchange, at short dates upon the credit of such country copartnership, either as drawers or acceptors, was excluded from the benefit of the proviso; and the anxiety upon this subject, is further manifested by the provision contained in the second section, that such country copartnerships shall not draw upon any person resident in *London*, any bill of exchange which shall be payable on demand, or for less than 50*l.* With such an object in view, it can scarcely be conceived to be within the intention of the legislature, that a bill of exchange at twenty-one days for 25*l.*, as in the present case, or, as it might be at three days for 5*l.*, for the argument is precisely the same, might be accepted by a banking copartnership in *London*, and circulated in *London*, upon their credit, without any violation of the prohibition in the same statute to owe money on such bill.

Lastly, to take into consideration the recent statute of 3 & 4 *W.* 4., the third section of that statute, after reciting the intention of the act to be, that the Governor and Company of the Bank of *England* should, during the period stated in that act (subject nevertheless to such redemption as was described therein), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the 39 & 40 *G.* 3., as regulated by the said recited act of the 7 *G.* 4., or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking; and that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege,

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and it was expedient that the same should be removed; it was, therefore, declared and enacted that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof, "provided that such body politic, &c., do not borrow, owe, or take up in *England*, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." Here is a modern act of parliament in which the expression of "bills or notes" is found to occur. Suppose this statute had stood alone, would any one, at this time of day, hesitate in construing it to intend bills of exchange and promissory notes? And when we see the expression in the section which recites that doubts had arisen as to the construction of the former acts, and as to the extent of the exclusive privilege, we think it amounts to a legislative declaration, that the words in the former statutes are to be construed in the sense which the same words import at the time when the new statute speaks.

But the second objection, grounded upon the words of the original statute, and upon which the principal reliance appears to have been placed in the course of the argument, is that the transaction stated in the case cannot be held to be a "borrowing;" that the acceptance by a banker of a bill, drawn upon him by his customer at a distant day, for the payment of his, the customer's money, placed in the banker's hands, is no loan to the banker, and consequently no borrowing by him, but merely a mode of payment to the customer of what is his own. But it appears to us, in the first place, that the acceptance of the bill under the circumstances stated in the case, is to be considered a borrowing in point of law. By taking the acceptance, the

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customer consents that his money shall remain in his banker's hands until the bill becomes due; he has no power or right, after receiving the acceptance, to change his mind, cancel the acceptance, and compel the banker to pay his money on demand. The drawing and accepting the bill forms a contract between the drawer and acceptor, which can only be rescinded by the mutual consent of both; for what would be the condition of the banker, who may have lent the money of his customer on the faith of the forbearance given, if the law were otherwise? The relative position, therefore, of the customer and the banker seems undistinguishable, as to its legal consequences, in any material respect, from that of lender and borrower.

But "borrow" is not the only word employed by the statute. The words used are, "provided they do not borrow, owe, or take up." Now we consider these latter words as put in apposition with the word "borrow," for the purpose of expounding the meaning in which the legislature intended to employ the first term. For, if "owe and take up" had been used in a sense essentially different from "borrow," the frame of the provision must be held to be incomplete. There is, upon that supposition, no length of time expressed in the statute, from the "owing or taking up," short of which time the bill or note cannot legally be drawn: for the proviso prohibits such bills or notes only, as are payable on demand, or at a less time than six months "from the borrowing thereof." The meaning of the term "borrow" must therefore be taken to have been considered by the legislature as substantially the same as that of the term "owe or take up," with which it is put up in juxta-position; and that the transaction amounts to "an owing" of money by the banker to his customer, can admit of no doubt. Whenever the drawer

drawer of a bill of exchange accepts it, he becomes a debtor to the holder of the bill to the amount of the sum specified in the bill; and the holder gives credit to the acceptor to that amount until the maturity of the bill. The relation of debtor and creditor, thus created by acceptance of the bill, appears to be considered by the legislature as equivalent to an actual borrowing of the money owed on the one hand, and credited on the other. That such was the opinion of the Court of King's Bench appears from the case of *Broughton* v. *The Manchester Water Works Company*, which was much referred to in the course of the argument; in giving judgment on which case each of the learned Judges states in effect, "that the acceptance made the company debtors, and to owe upon their bills."

It was objected, in the third place, that, even if there was a borrowing by the Defendant, yet they have not borrowed "on their bills," and that the statute only prohibits a borrowing "on their bills or notes." But we are of opinion that, if the bankers are to be held borrowers, and the acceptance of the bill drawn upon them is the security they give for the debt, they do, in common parlance, borrow on their bills when they borrow on their acceptances. The acceptor is as much a party to the bill as soon as he becomes a party to the bill as the drawer; indeed, he is the person primarily liable on the bill, as soon as he becomes a party to it by giving his acceptance. But, after all, the expression both in the statute of *Anne* and the subsequent acts of "their bills or notes" may only have been used to distinguish them from the bills or notes of the Bank of *England*. And, if the interpretation of the statute could be otherwise held, what an easy mode would be opened for evading the prohibition of the statute!

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It was insisted upon, in the course of the argument, that the holding of the acceptance stated in the case to be illegal would invalidate the security of all transactions in bills of exchange, where the acceptors consisted of a partnership of more than six persons; for that no one could tell, by looking at the bill, at what period the time of borrowing took place, or whether the bill had six months to run from such time or not. The first answer to this objection is, that the difficulty does not occur in the present or in any case where the bill is drawn at less than six months from its date; for, in such case, every person must know that the bill had been accepted within six months from the borrowing. Secondly, that although, if a bill should be drawn at a longer period than six months, and accepted within six months next before the time of its maturity, the transaction would be a violation of the provisions of the statute, and all persons who were privy to it would be prevented from enforcing the acceptance, still such violation of the prohibition of the statute would not affect a *bonâ fide* holder without notice. If bills of exchange so accepted cannot lawfully be issued, the danger of their being employed as circulating paper cannot be great; but, on the other hand, if bills at very short dates might be lawfully accepted, it is obvious that a paper circulation might be created by such bills almost equivalent to a circulation of promissory notes payable on demand.

Notwithstanding, therefore, the objections which have been urged, on the part of the Defendants, to the construction of the clauses above adverted to, we are of opinion that the acceptance stated in the case falls within the prohibition contained in the statute of *W.* 4.; and we feel no doubt that it falls within the mischief which the statute of *Anne* and all the subsequent acts intended to provide against, namely, the permitting any other

other body corporate, or any partnership consisting of a large number of persons, to enter into competition with the Bank of *England* by the issue of notes or bills either payable on demand or at short periods from their issue.

This construction of the prohibitory clause gives a real benefit and protection to the Bank of *England;* and that something real and substantial was intended to be given by the legislature on the one hand, and was, on the other hand, thought and believed by the Bank of *England* to be given to them, is evident from the constant repetition in all subsequent acts in the same words of the identical provision contained in the statute of *Anne*: for, if not a real privilege, why was it continued to be inserted? The construction contended for by the Defendants, that it must be confined to bills under the seals of corporations, or copartners, gives in reality no benefit or protection at all at the present period, if it ever could have given any.

But it is not only to be considered that such was the sense in which parliament and the Bank of *England*, who may be considered the contracting parties, understood the provision; but such also has been the general understanding of all at the time the first act passed, and from thence to the statute of *W.* 4. For no instance can be pointed out, until the present, in which a banking copartnership, consisting of more than six persons in number, have been found in the course of their dealing as bankers to accept bills of exchange, payable at a less interval than six months from their acceptance. And, if no other argument was brought forward, we attribute great weight to the maxim of law, *contemporanea expositio fortissima est in lege.*

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Upon the whole, therefore, we shall certify to the Master of the Rolls the opinion of the Judges who heard the augument to the effect stated.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and are of opinion that the acceptance, by the *London* and *Westminster* Bank, of the bill mentioned in the case was not lawful, regard being had to the provisions of the act 3 & 4 *W.* 4. *c.* 98., and the other acts passed and now in force respecting the Bank of *England*.

N. C. Tindal.
S. Gaselee.
J. Vaughan.
J. B. Bosanquet.

Jan. 21, 23, 24.

Sir *Frederick Pollock*, Mr. *Wigram*, and Mr. *Griffith Richards* now renewed their motion for the injunction. They stated that, as the arguments which they had on a former occasion addressed to the Court were now fortified and confirmed by the certificate of the Court of Common Pleas, they should abstain from making any further observations in support of the application, until they heard the arguments of the counsel for the Defendants, on whom the *onus* was now thrown, of endeavouring to displace, if possible, the effect of the arguments, and the authority with which they had to contend.

The Attorney-General, Mr. *Pemberton*, Sir *W. Follett*, Mr. *Crowder*, and Mr. *Sharpe*, *contrà*.

The question raised upon this motion is one of great importance, not only as it affects the interests of the respectable

respectable and opulent body who constitute the *London* and *Westminster* Bank, whose ordinary transactions in their character of a bank of deposit this Court is called upon by its extraordinary interposition to disturb, but as it affects the commercial interests of the whole country. The certificate of the Court of Common Pleas is undoubtedly entitled to the greatest respect; but the reasons upon which the opinion of the learned Judges is founded are unsatisfactory, and do not support the conclusion at which they have arrived. The fundamental objection to the certificate is this: — that the learned Judges have assumed the transaction to be the transaction of a bank of issue, whereas it is clearly the transaction of a bank of deposit.

If the transaction impeached by the Plaintiffs were a transaction belonging to a bank of issue, we admit that it would be illegal; but if it be the transaction of a bank of deposit, the legislature, by the 3 & 4 *W.* 4. *c.* 98., has legalised every thing which is incidental to the business of banks of deposit, of whatever number of persons they may consist, and whether it be within sixty-five miles of the metropolis, or beyond; and the *onus* lies on the other side to shew that the accepting of of a bill of exchange, drawn by a customer, is not a part of the ordinary business of a bank of deposit. If it be a part of the ordinary business of a bank of deposit, it is not forbidden; and, unless forbidden by some clear and unequivocal enactment, it is lawful. The distinction between banks of deposit and banks of issue is scarcely touched upon in the certificate of the Court of Common Pleas; yet it is impossible to put a just construction upon the provisions of the acts relating to the Bank of *England* without bearing that distinction in mind, and without looking carefully into the historical details connected with the subject of banking, both in this

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this country and the principal commercial states in *Europe*. The best text writers, from whose works information on this subject is to be collected, must be examined, in order to see under what circumstances and for what objects the Bank of *England* was incorporated; what was the nature of its connection with the government; to what extent it affected the operations of other banking establishments; and with what views, and under what limitations, enactments for its protection were from time to time made by the legislature: *Anderson's History of Commerce; Macpherson's Annals of Commerce; Smith's Wealth of Nations; Daru's History of Venice*, book 19.; *Montefiore's Commercial Dictionary; M'Culloch's Dictionary of Commerce*. So little, however, was this view of the question recognised in the Court of Common Pleas as the legitimate foundation on which it ought to be discussed, that, when it was proposed to read as a matter of history an extract from a scarce book in the *Bodleian* library, and a document from the Rolls' chapel, tending to illustrate a passage in *Anderson's History of Commerce*, and to explain the intention of the legislature in passing the statute of the 6th of *Anne*, the Court, upon the ground of inconvenience, would not permit that course to be pursued. It is indispensably necessary, in order to come to a sound conclusion on this question, to examine the subject in its historical details, and to take contemporaneous exposition as our guide in construing the acts of parliament relating to the Bank. It was admitted by the Judges at the close of their certificate that doubtful expressions in acts of parliament were best elucidated by contemporaneous exposition; yet the conclusion at which they arrived was in no degree influenced by that principle; and, on the occasion just adverted to, the Defendants were shut out from the opportunity of applying the principle. Contemporaneous exposition of the acts

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acts relating to the Bank proves, beyond all controversy, that the provisions, by which exclusive privileges were conferred upon the Bank, were framed for its protection as a bank of circulation, and not as a bank of deposit. What is the transaction impeached by the Plaintiffs? The *London* and *Westminster* Bank having money in its hands deposited by Mr. *Muskett*, a customer, Mr. *Muskett* desires to have a sum of 25*l.* paid to him, and by drawing a bill of exchange upon the *London* and *Westminster* Bank, orders them to pay him that sum at twenty-one days after the time at which the order is made. They obey the order by accepting the bill, or promising to pay the money, and they pay it accordingly. This was not the operation of a bank of issue; nor was there any attempt at a fraudulent evasion of the exclusive privileges of the Bank by the introduction of a new species of circulating medium which should come into competition with the notes of the Bank of *England*. The Bank at first attempted to shew that there had been a fraudulent evasion of their privileges; they made a charge without foundation, which they afterwards abandoned; and it is not now disputed that the transaction in question was a *bonâ fide* acceptance of a bill drawn by a customer and given by the acceptors for a *bonâ fide* debt due to the customer. The common way of making an order for the payment of money deposited in the hands of a banker is to write a cheque for it. It is admitted that a cheque may be lawfully drawn upon a bank of deposit; and what is a cheque but a bill of exchange payable *instanter?* — a written order by the creditor for the payment of money by the debtor in favour of a third person, and sometimes for payment to himself? If it be lawful for the creditor to draw such a bill of exchange, how can it be unlawful for the debtor to accept or promise to pay it? The transaction between

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tween the banker and the customer is equally the transaction of a bank of deposit, whether the order to pay be obeyed *instanter*, as in the case of a cheque, or the money be paid after an acceptance or promise to pay it. See the injurious consequences which would arise, if the argument of the Plaintiffs was to be sustained. By the 9 *G.* 4. *c.* 23. country bankers are enabled, upon payment of a composition in lieu of the stamp duties, to issue promissory notes, payable on demand, or otherwise, and to draw unstamped bills of exchange, payable on demand, or within a limited period after sight or date, upon *London* bankers; but if they draw upon the *London* and *Westminster* Bank, which is a *London* bank lawfully constituted under the 3 & 4 *W.* 4. *c.* 98., and their bill is accepted, the transaction, according to the argument of the other side, is illegal; and the bill may be dishonoured. Again, suppose a customer of the *London* and *Westminster* Bank, who has money deposited in that bank, goes abroad, and obtains money from a foreign banker upon the credit of a bill of exchange drawn upon the *London* and *Westminster* Bank, if the foreign banker sends the bill to *England*, he is to be told that the bill must be protested, for the municipal law does not allow the *London* banker to accept it. There is no limit to the inconvenience and mischief which would accrue from the establishment of the extraordinary privilege for which the Bank of *England* is contending. The Bank claims the right of restraining, not only banking companies, but all copartnerships consisting of more than six persons, within sixty-five miles of *London*, from accepting bills of exchange at a less date than six months from the time of acceptance. And, indeed, if the claim could be sustained against banking companies, the liability would necessarily extend to a large proportion of the principal mercantile houses in *England*, for

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for every *West India* and *East India* house, and every considerable commercial house in the country, acts to a certain extent as a bank of deposit for their customers, keeping their money and paying it away upon order, either by immediate payments, or by accepting the bills of exchange drawn by their customers. Every private bank in *London* is in the habit of accepting bills of exchange, drawn by their customers, without reference to the time at which they are payable. It is said that such banks do not, for the most part, consist of more than six persons; but, since the 3 & 4 *W.* 4. *c.* 98., the number of partners in a bank is immaterial; and the only question is, whether the bank is a bank of issue or a bank of deposit. This distinction having been excluded from the consideration of the Judges of the Court of Common Pleas, we submit that there is no legitimate foundation for the conclusion at which they arrived.

Another ground of objection to the certificate is, that the Judges of the Court of Common Pleas supposed that, unless the word "bills" in the 6th of *Anne* excluded bills of exchange, no benefit would be conferred upon the Bank; and that, as not only corporations but partnerships were forbidden to issue bills, the word "bills" could not possibly mean sealed bills only, because partnerships could not be parties to sealed bills. Now, to say nothing of the obvious answer to this reasoning, that partnerships might easily have become parties to sealed bills by giving a power of attorney to seal bills in their names and on their account, the Judges seem to have entirely overlooked the fact that the word "notes" is introduced into the 6th of *Anne* as well as the word "bills;" and that *reddendo singula singulis* corporations were forbidden to issue sealed bills, and partnerships were forbidden to issue notes not under seal.

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seal. To assume that the Bank would have had no advantage conferred upon it if, in the 6th of *Anne*, bills did not include bills of exchange, is to assume that it was no advantage to be protected against the rivalry of any other bank of issue. It is supposed in the certificate that bills of exchange at a short date might easily get into extensive circulation, and form a part of the circulating medium, so as to compete or interfere with Bank notes. But that is surely a danger little to be apprehended. It would be long before a bill of exchange would be received as a substitute for the currency of the country, and passed generally from hand to hand as the representative of so much coin. If the bill of exchange is not due, the party taking it has to consider the names of the drawers and acceptors, and the rate of discount before he can form a judgment of its value. If the bill of exchange is over-due, it is subject to all the equities of the persons through whose hands it may have passed from the time at which it was payable, and no prudent man will readily take a bill of exchange which is over-due. Bills of exchange, therefore, even if they were made payable at five days from the date, which is a case put in the certificate, are never likely to answer the purposes of the current coin of the realm, or to come into competition with the notes of the Bank of *England*.

Considering the narrow ground which the Judges of the Court of Common Pleas have taken in forming their conclusion, we submit that their certificate ought not to be considered as conclusive or binding on the judgment of this Court. Upon a great variety of cases which may arise, they have abstained from giving any opinion. They give no opinion as to the legality of accepting a bill of exchange, payable at less than six months, for a debt due from a partnership of more than six persons,

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as a debt for rent, goods sold and delivered, and the like. They give no opinion as to the legality of such an acceptance by a partnership of more than six persons not engaged in the business of banking. Supposing the drawers to have valuable security instead of money in the hands of the bankers, they give no opinion upon the validity of such an acceptance by the bankers in that case. Neither is any opinion given upon another case of daily occurrence, where there is partly money and partly security in the hands of the banker. Upon another case, where there is neither money nor security in the hands of the drawees, but the drawees accept on the credit of the drawers, no opinion is given. Another case, unnoticed in the certificate, is, where the drawers have money in the hands of the drawees at the time the bill is drawn, but, by an express or understood arrangement between the parties, the money is withdrawn after the acceptance, and replaced by other money before the bill becomes due. Upon no one of these six cases have the Judges of the Court of Common Pleas given any opinion.

The *onus* of establishing the privilege contended for lies clearly upon the Bank. The Bank of *England* is in its constitution only a private company, though its connection and its dealings with the government distinguish it for certain purposes from other joint-stock companies; and, notwithstanding its dignity, the privileges which have been given to it in restraint of trade and against the common law must receive the same strict and jealous construction in a court of law or equity as similar privileges given to any other company, however inconsiderable. All grants to individuals or companies in restraint of trade are to be strictly construed; all penal laws are to be strictly construed. Whenever a claim is set up on the part of individuals

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or companies, the effect of which is to restrain men from doing that which was before lawful — whenever an encroachment is made upon public rights, the party or parties contending for the encroachment must make out their claim by clear and unequivocal enactments. If the legislature ever intended that it should be unlawful for any corporation or partnership consisting of more than six persons to accept a bill of exchange payable at a shorter date than six months, how easy it would have been to have said so in clear and unequivocal language! And when it was so easy to prohibit that which is said to be prohibited, and we find no such prohibition, does not this circumstance afford a strong inference that the language of the act, which is supposed to imply the prohibition, was used with a different intent, and directed to a totally different purpose?

The Bank of *England* relies on the 3 & 4 *W.* 4. *c.* 98., by the second and third sections of which act the privileges of the bank are protected. The second section enacts, "that during the continuance of the said privilege, no body politic or corporate, and no society or company, or persons united or to be united in covenants or partnership, exceeding six persons, shall make or issue in *London*, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand." This section is not violated by the transaction of the *London* and *Westminster* Bank. The bill of exchange accepted by that bank was not a bill of exchange upon which any person holding the same might obtain payment *on demand;* and if the intention of this section had been to prohibit the acceptance of any bill of exchange payable at a less date than six months from the date or acceptance thereof, would

would not language have been introduced into the clause sufficient to express the intention?

The third section declares that the intention of the act is that the Governor and Company of the Bank of *England* should, during the period stated in the act (subject nevertheless to such redemption as is described in this act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the thirty-ninth and fortieth years of the reign of his Majesty King *George* III., as regulated by the said recited act of the seventh year of the reign of his late Majesty *George* IV., or any prior or subsequent act or acts of parliament; but no other or further exclusive privilege of banking." And, by the fifteenth section of the 39 & 40 *G.* 3., to prevent any doubts that might arise concerning the privilege or power given by former acts of parliament to the said Governor and Company of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege granted to the Governor and Company of the Bank of *England*, as thereinbefore recited, it was enacted and declared, that it was the true intent and meaning of the said act that no other bank should be erected, established, or allowed by parliament; and that it should not be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during

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the continuance of such privilege to the Governor and Company. The Plaintiffs, therefore, are bound to shew that the transaction in question is a borrowing, owing, or taking up of money by the Defendants, on their bill, payable at a less time than six months from the borrowing thereof.

It is necessary to trace the history of this clause, which was first introduced into the statute 6 *Anne*, *c.* 22., in order to put a just construction upon it.

In the year 1694, when the Bank of *England* was first erected, there were four great banks in *Europe*; those of *Venice*, *Amsterdam*, *Hamburgh*, and *Genoa*.

The Bank of *Venice*, which, in point of date as well as of importance, was the first banking establishment in *Europe*, having been founded in the middle of the twelfth century, was a general bank of deposit for merchants and traders. The government took advantage of the law, which prohibited the nobles from engaging in commerce, to suppress private banks, and by taking upon itself the regulation of the national bank became, in effect, the general banker of the community. A law was passed that all payments for merchandise and bills of exchange, where the value exceeded 300 ducats, should be *in banco*, or bank notes; and that all debtors and creditors should be obliged, the one to carry money to the bank, the other to receive their payment *in banco*; so that payments were made by a simple transfer from one to the other. This mode of payment by a transfer of credit in the books of the bank from one man to another, was, of course, applicable only to cases where the parties had accounts at the bank, or he, who had not, was in a situation to open an

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an account. The bank paid no interest on its deposits; but, on the contrary, its notes bore an agio or premium over the current coin of the city. (*a*)

The Bank of *Amsterdam* was a bank of deposit; and was founded in 1609, to remedy the evils produced by the depravation of the current coin. The bank received both foreign coin and the light and worn coin of the country at its real and intrinsic value, according to the good standard money of the country, deducting only so much as was necessary for defraying the expense of coinage and management. For the value which remained, after this small deduction was made, it gave a credit in its books. This credit was called bank money, which, as it implied money newly coined according to the standard of the mint, was always of the same real value, and intrinsically worth more than current money. It was, at the same time, enacted by law, that all bills drawn upon or negotiated at *Amsterdam* of the value of 600 guilders and upwards should be paid in bank money. Every merchant, in consequence of this regulation, was obliged to keep an account with the bank, in order to pay his foreign bills of exchange, which necessarily occasioned a certain demand for bank money. According to the principles upon which this bank was established, the bullion in its coffers was to be at all times equal to the amount of its liabilities. In consequence of the advantages belonging to the bank money of *Amsterdam*, it bore from the beginning an agio or premium over the current coin of the country.

The Bank of *Hamburgh*, which was established in 1688, was also a bank of deposit, of which the free citizens

(*a*) *Daru, Histoire de Venise,* liv. xi. 20. liv. xix. 19.; *Monte-fiore's Commercial Dictionary,* art. *Bank.*

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citizens and corporations were sureties. It received deposits from the citizens of *Hamburgh* without paying any interest. Payment was made into it by notes of transfer on the bank.

The Bank of *Genoa* was a bank of circulation as well as a bank of deposit. The capital was composed of certain branches of the public revenue appropriated by the government for that purpose, and loans advanced by individuals to meet the exigencies of the government. For the loans which the proprietors of this bank had originally advanced to the government they had a perpetual fund of interest; and they also obtained the privilege of being cash-keepers for merchants and others. (*Macpherson's Annals of Commerce; Montefiore's Commercial Dictionary*, article *Bank; M'Culloch's Dictionary of Commerce.*)

In all these establishments the object was to substitute something for the current coin of the realm; but the Banks of *Venice*, and of *Genoa*, besides being banks of deposit, were banks of circulation, issuing their bills upon the national credit to the extent to which they had made advances to the state. Upon this principle the Bank of *England* was established. The persons incorporated by the name of the Governor and Company of the Bank of *England*, by the 5 & 6 *W. & M. c.* 20., were to lend 1,200,000*l.* to the government; and they were empowered by the act to borrow or give security by their bills, bonds, covenants, or agreements, under their common seal, to the extent of exactly the same sum, and no more, which they had lent to the government. They were to borrow upon their bills and other securities under seal to this extent; and if they could borrow at a low rate of interest, or if they could issue their paper upon their own credit without paying any interest,

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interest, they would make a profit accordingly. The act gave them no monopoly, except that their bills, obligatory and of credit, under their common seal to the extent limited by the act, were made transferable by indorsement; and the assignee was to have the right and property in the bills so transferred. No other bills obligatory were transferable; so that in this way, and in this way only, the bank had an exclusive control over the circulating medium within the prescribed limits. The Bank of *England* was an establishment for the purpose of circulating securities or paper to a certain extent, upon the credit of government, in lieu of the coin of the realm. The act incorporating the Bank speaks only of bills, not notes; and these bills were not bills of exchange, but commercial instruments of a totally different description, known by the name of sealed bills or single bills, which were in no degree connected with banking, though they might be used by bankers as well as by other persons. Besides the sealed bills, which bore interest, the bank also issued cash notes, which did not bear interest.

In the 7th and 8th years of the reign of *W.* 3., an act of parliament was passed for establishing a National Land Bank, for lending money at low interest on the security of land, by which act very nearly the same privileges were given to the projected company as to the Bank of *England*. The project, however, failed, a sufficient sum of money not having been subscribed within the time limited by the act. The projected National Land Bank was to have had power given to it by the act to issue its bills obligatory, exactly in the same manner and under the same limitations as the Bank of *England*. (*Anderson's Hist. of Commerce.* (*a*))

At

(*a*) vol. ii. p. 211. fol. edit. 1764.

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At the time of the failure of the project for the establishment of the National Land Bank, the Bank of *England* had already fallen into difficulties in consequence of its having over-issued its paper, which was at a depreciation of 20 per cent. in comparison with the current coin. "These distresses," says *Anderson*, in his *History of Commerce* (*a*), "obliged the Bank to make two different calls of 20 per cent. each on their members, in the year 1696, and to issue bank sealed bills at 6 per cent. interest in exchange for bank cash notes, and to advertise for the conveniency of trade (while the silver was recoining) that such who think it for their conveniency to keep an account in a book with the bank may transfer any sum under *5l.* from his own to another man's account, which was falling into the method of the Bank of *Amsterdam*." From these difficulties the Bank was relieved by the act of the 8 & 9 *W.* 3. *c.* 20., by which the capital stock of the Bank was enlarged, new subscriptions were authorised to be raised to supply the wants of the government, and the power of the Bank to issue their bills or notes was enlarged to the extent of the new subscriptions and no further. The Bank of *England*, alarmed at the rivalry of the projectors of the National Land Bank, who had in the last year obtained the assent of the legislature to the establishment of a rival bank, procured a clause for their protection against any similar attempt to be inserted in this act. By the twenty-eighth section, it is provided that "during the continuance of the corporation of the Governor and Company of the Bank of *England* no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament within this kingdom." The word "bank"

(*a*) vol. ii. p. 218.

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"bank" is here plainly used in the sense of a bank of circulation, and not of a bank of deposit. The legislature did not mean to prohibit any person or persons from carrying on the business of banking. The clause involved no interference with the law of merchant — no encroachment upon the common-law rights and privileges of the King's subjects. The protection given to the Bank by this clause was this, — that the Bank of *England* should be the only bank permitted to issue its own paper on the credit of the government. By this act, and from this time, all the bills or notes of the Bank were to be payable on demand. The act 5 & 6 *W. & M.* speaks of "bills obligatory and of credit," or "bills" only; in the 8 & 9 *W.* 4. the expressions "bills," "bank bills," "sealed bills," are used indifferently, all meaning the same thing, namely, single bills or bills under seal, distinguished from notes, which were only signed. That these bills did not mean bills of exchange, but that they were the single bills issued by the bank, and forming part of the circulating medium, appears from the following passage in *Anderson's Hist. of Commerce* (*a*): "During the recoinage of our silver (says *D'Avenant*, in the second part of his *Discourses on the Public Revenues and Trade of England* (*b*), all great dealings were transacted by tallies, bank bills, and goldsmiths' notes. Paper credit did not only supply the place of running cash, but greatly multiplied the kingdom's stock; for tallies and bank bills did to many uses serve as well, and to *some* better than gold and silver. And this artificial wealth, which necessity had introduced, did make us less feel the want of that real treasure which the war, and our losses at sea, had drawn out of the nation." The act 8 & 9 *W.* 3. also speaks of exchequer bills, which are noticed by *Anderson* as a new circulating paper credit, first

(*a*) page 219. (*b*) page 161.

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first set on foot in the year 1696 by issuing bills from the exchequer, and of great use during the recoinage. Thus far the conclusion seems to be irresistible, that, if contemporaneous history had been followed as the true principle of exposition, the "bills," "bank bills," and sealed bills," mentioned in the two first acts of parliament relating to the Bank, could not possibly have been confounded with, or have been supposed to include bills of exchange.

In the 9th and 10th years of the reign of *W.* 3., an act was passed enabling the persons to whom inland bills of exchange were made payable after acceptance and the expiration of three days from the time at which such bills became due to protest the same.

By the 3 & 4 *Anne*, *c.* 19., the preamble of which recites that promissory notes were not assignable or indorsable over, and that trade and commerce would be much encouraged if such notes were put upon the same footing as inland bills of exchange, it was enacted, that all notes in writing, which should be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any company, banker, goldsmith, merchant or trader, usually intrusted to sign such notes, whereby such person, &c. should promise to pay the sum of money mentioned in the note, should be assignable and indorsable over in the same manner as inland bills of exchange. Hitherto the bills and notes of the Bank of England were the only bills and notes which the law had made transferable by indorsement; but the effect of 3 & 4 *Anne* was to strike at this exclusive privilege, and to make promissory notes universally transferable by indorsement. The consequences of this enactment were probably not contemplated by the legislature, but speculators lost no time in taking advantage of

of it; and first the Million Bank, and then the Mining Bank, began to issue their promissory notes, which were made negotiable by the statute, as well as their sealed bills, to a large extent.

We now come to the 6th of *Anne;* and great light is thrown upon the origin of this act of parliament by passages in *Anderson's History of Commerce.* (*a*) "In the year 1704," says that writer, "queen *Anne* granted a charter of incorporation to a great number of noblemen and gentlemen of distinction, and eminent citizens of London. Its preamble declares it to be at the humble request of *Thomas* Duke of *Leeds*, *Pawlet* Earl of *Bolingbroke*, *Francis* Lord *Guildford*, Sir *Thomas* and Sir *Humphrey Mackworth*, 'for the working and managing of mines and minerals, and smelting, refining, and manufacturing the same; and they are to be for ever one body politic, by the name of the Governor and Company of the Mine Adventurers of *England*. The Duke of *Leeds* to be a governor for life, and to elect a deputy-governor, and twelve directors, by their general consent, who are also empowered to make bye-laws, &c. as customary in other royal charters.' Hereupon, in the same year, Sir *Humphrey Mackworth* and Sir *William Waller*, who had before purchased sundry leases for terms of years of certain mines in different parts of *Wales*, did now convey them to this new company, on certain conditions mentioned in that conveyance. This company principally, if not solely, under Sir *Humphrey Mackworth's* direction, who was elected deputy-governor for life, went on in a pompous manner, adding so many shares as made the whole number of shares to amount to 6,012; purchasing fresh mines, and raising vast quantities of lead and copper, and litharge, from which they made

(*a*) vol. ii. pages 242. 248.

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made a great deal of red lead, and from the lead they extracted considerable quantities of silver. And they issued cash notes, which they caused for some time to be circulated through a great part of *Wales*. They also erected themselves into a money bank, and circulated their sealed bills and cash notes for some time in *London*, till restrained by a clause in an act of parliament, *anno* 1708, in favour of the Bank of England, elsewhere mentioned. Sir *Humphrey Mackworth* went on imposing on the proprietors for five years from the date of the charter by false and sham calculations of their profits; by producing lead and litharge from other people's mines, and declaring them to be digged from the company's mines; buying also the silver extracted from other men's lead, and getting it to be coined in the King's mint as coming from the company's mines, whilst at the same time he is not able to go on without fresh artifices, and calls on the proprietors now to pay the vast expenses of workmen, &c., whose wages were suffered to run in arrear; and his schemes being too extensive for his company's abilities, he was obliged to stop payment of their sealed bills and cash notes, being by such wild management run greatly in debt, whilst at the same time he is erecting of charity schools in *Wales* with the company's money, for the drawing in of well-meaning people. All which brought on a parliamentary inquiry, as will be seen in the year 1710."

Under the year 1708, he proceeds as follows: — "By a statute of this same year, the 6th of *Anne*, *c.* 22., for continuing certain duties therein mentioned upon coffee, &c., and for securing the credit of the Bank of *England*, &c., it was amongst many other points enacted, 'that during the continuance of the Governor and Company of the Bank of *England*, it shall not be lawful for any body politic, erected or to be erected, other than the said

said Governor and Company of the Bank of *England*, or for other persons whatsoever, united or to be united in covenants or partnership, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof.' The reason herein assigned for this enacting clause was, 'that some corporations (notwithstanding the law of the 8th of king *William*, *c.* 19.) by colour of their charters, and other great numbers of persons by pretence of deeds or covenants united together, had presumed to borrow great sums of money, and therewith to deal as a bank, to the apparent danger of the established credit of the kingdom.' This clause was principally aimed at The Mine Adventure Company, who, contrary to law, had set up banking, and issued cash notes, as we have already related."

The object of the 6th of *Anne* was not to enlarge the privileges of the Bank of *England*, but to restore to it those privileges which had been invaded by the Million Bank and the Mining Bank, and to prevent any other company or partnership consisting of more than six persons from acting as a bank of issue. The clause in question was a recognition of an existing right in the Bank of *England* to act exclusively as a bank of issue, and did not interfere with the undoubted right of any private bank or partnership in the kingdom consisting of more than six persons to receive the money of those who might employ them, and pay it away upon their order.

The clause is re-enacted without any recital in the 7th of *Anne*, by which the capital of the Bank of *England* is enlarged.

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The same clause is also re-enacted without any recital in the forty-fourth section of the 3 *G.* 1. *c.* 8., the next act relating to the Bank of *England*.

The 15 *G.* 2. *c.* 12. introduces the clause in the following words: — "And to prevent any doubts that may arise concerning the privilege or power given by former acts of parliament to the said Governor and Company of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking, during the continuance of the said privilege granted to the Governor and Company of the Bank of *England*, as before recited, it is hereby further enacted and declared, that it is the true intent and meaning of this act that no other bank to be erected by parliament shall borrow, owe, or take up, &c.," as in the clause of 6 *Ann.*; and in that form it is repeated in the 4 *G.* 3., the 21 *G.* 3., and the 29 & 30 *G.* 3. One of the grounds upon which the Court of Common Pleas rest their opinion that the word "bills" in the prohibitory clause must include bills of exchange is, that the word "bill" in the twelfth section of the act 15 *G.* 2. *c.* 12. necessarily includes bills of exchange, and therefore that the same word must receive a similar construction in the fifth section. It is obvious that the same word may be used in two different senses in the same act of parliament; but the judges have overlooked the material distinction, that in the twelfth section the word "bill" is preceded by the word "any;" and that the real question in this case is, in what sense the word "bills" in the prohibitory clause was to be understood at the time of its enactment.

Whatever was the true meaning of the prohibitory clause in the reign of queen *Anne*, that must be its meaning in the 3 & 4 *W.* 4. *c.* 98.; for it is expressly declared

clared that there is no intention on the part of the legislature to enlarge the privileges of the Bank of *England*. Did the legislature, then, in introducing the prohibitory clause in the 6th of *Anne*, intend to prevent the acceptance of bills of exchange for antecedent debts by more than six persons? If it meant to do so, it has not expressed its intention: such a prohibition does not come within the preamble or the enacting words of the statute. The word *bill* in old acts of parliament, and in old reports, did not mean a bill of exchange, but it meant in legal language a sealed bill. It is only in comparatively modern times that the word "bill" without any words of addition has been applied to bills of exchange. Chief Baron *Comyns* in his *Digest* (*a*) says, that payment by a merchant shall be made in money, or by bill; and that payment by bill is by bill of debt or bill obligatory, bill of credit or bill of exchange. Formerly the word "bill," used by itself, no more meant a bill of exchange, than it meant a bill of lading, or a bill of fare, or a bill of the play. *Jacob* in his *Law Dictionary* says, "We are now to see the sense in which it is used among merchants, as a security for money. 'Bill' is also a common engagement for money given by one man to another; and is sometimes with a penalty, called penal bill, and sometimes without a penalty, though the latter is more frequently used. By a bill we ordinarily understand a bond without a condition. It was formerly all one with an obligation, save only its being called a bill when in *English*, and an obligation when in *Latin*. A bill has been defined to be a writing wherein one man is bound to another to pay a sum of money on a day that is future, or presently on demand, according to the agreement of the parties at the time it is entered into and the dealings between them. A bill obligatory written

(*a*) tit. *Merchant, F.*

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written in a party's hand and seal to it is good. A man says by his deed, 'Memorandum, that I, *A. B.*, have received of *C. D.* the sum of 20*l.*, which I promise to pay to *E. F.*; in witness whereof I have hereunto set my seal,' &c. Or if the bill be, 'I shall pay to *C. D.*, in witness,' &c., and be sealed; or if it run as follows, 'I owe to *C. D.* 20*l.*, to be paid him again;' or 'I, *A. B.*, do bind myself to *C. D.* that he shall receive 20*l.*', &c.; all these are said to be obligatory." He then gives the form of such a bill, and afterwards gives a distinct definition of bills of exchange. In *Johnson's Dictionary* there is a distinct definition of the expression "a bill of exchange," as there is of the expressions "a bill of mortality" and "a bill of fare;" and the passages in *Taylor* and *Locke*, cited to support the definition, contain the expression, and not the single word "bill." The compound expression "bank bill" is defined by Dr. *Johnson*, "a note for money laid up in a bank, at the sight of which the money is paid;" and this passage in *Swift* is cited, "Let 300*l.* be paid her out of my ready money, or bank bills." In the twenty-fifth, twenty-seventh, and twenty-eighth sections of the act 5 & 6 *W. & M.*, the word "bills" is used in the sense of "sealed bills;" as it is also in the 8 & 9 *W.* 3. *c.* 20. The 12 *Ann. c.* 11. *s.* 16., empowers the Bank of *England* to make contracts with any persons, natives or foreigners, bodies politic or corporate, for the furnishing of monies to the Bank; and the seventeenth section empowers the Bank to issue out bank bills under their common seal. The 9 & 10 *W.* 3. *c.* 44. *s.* 89. contains a definition of bank bills, providing that bills under the seal of the Governor and Company of the Bank of *England*, commonly called bank bills, shall be received in payment of certain taxes.

The mode of dealing between the Bank of *England* and the individual who contributed to the public loan was this —

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this — the Bank gave a bill under seal, or a note not under seal, the form of each instrument being the same, by way of security for the money advanced. The act 7 & 8 *W.* 3. *c.* 31. for establishing the National Land Bank, to which the same powers were given as to the Bank of *England*, provides, that, "in all cases where any sum or sums of money shall be advanced upon the credit of bills to be made payable on demand, the person or persons so advancing or paying any such sum or sums of money shall immediately have a bill or bills delivered to him for so much as the principal money so advanced or paid shall amount to." And in the thirty-second section of that act the form of the bill is given: "The Governor and Company of the National Land Bank do hereby charge the lands entered, &c. for payment whereof they oblige themselves and their successors by these presents, which said bill shall effectually charge the lands."

The act 11 *G.* 1. *c.* 9., after reciting that "of late divers frauds and deceits had been put upon the Governor and Company of the Bank of *England* and other persons by the altering, forging, and counterfeiting of the bank bills and bank notes of the said Governor and Company, and by the erasing and altering of the said bills or notes and the indorsements thereupon, and by the tendering in payment, uttering, vending, exchanging, and bartering of such altered, forged, and counterfeited and erased bills and notes and the indorsements thereupon, to the prejudice of the public credit, and to the great hurt and diminution of trade and commerce, enacts, that if any person shall alter, forge, or counterfeit any bank bill or bank notes, &c., he shall be deemed guilty of felony." The forging of bills of exchange was not at that time a felony, nor was it made a felony until the reign of *George* the Second. Bills of exchange, therefore, were not included in the act by

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which the forging and counterfeiting of bank bills and bank notes was made a felony.

The Judges of the Court of Common Pleas place much reliance on the third section of the 7 *G.* 4. *c.* 46., by which it is provided, with respect to those who are privileged to issue paper at a distance of more than sixty-five miles from *London*, that they are "not to borrow, owe, or take up in *London*, or at any place or places exceeding the distance of sixty-five miles from *London*, any sum or sums of money, or any bill or promissory note of any such corporation or copartnership, payable on demand, or at any less time than six months from the borrowing thereof, nor to make or issue any bill or bills of exchange, or promissory note or notes of such corporation or copartnership, contrary to the provisions of the said recited act." Now the provisions of the recited act, namely, the 39 & 40 *W.* 3., do not prohibit the making or issuing of bills of exchange, unless the clause in the 6th of *Anne*, which is repeated in that act, prohibit the making of them; and, if it does not, the mere introduction of the words "nor to make or issue, &c." in the 7 *G.* 4., cannot enlarge the operation of the prohibitory clause in the 6th of *Anne*.

But if there be any doubt as to the construction of the 39 & 40 *G.* 3., or of any prior or subsequent act or acts in respect of the exclusive privilege of banking given to the Bank, the third section of the 3 & 4 *W.* 4. *c.* 98. is introduced for the express purpose of removing such doubt; and that section enacts, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership,

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ship do not borrow, owe, or take up in *England* any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." This proviso corrects the error introduced into the 7 *G.* 4., and re-enacts the clause in the 6th of *Anne*, which restrains the issuing of sealed bills and promissory notes, but has no reference whatever to bills of exchange.

The next point on which the Judges of the Court of Common Pleas have delivered their opinion is, whether the transaction in question is a "borrowing" within the meaning of the act of parliament. Borrowing, in the sense in which it is used in these acts of parliament, is taking money for public purposes upon a security given for the money advanced. Borrowing was the dealing by which the Bank was empowered to receive the money advanced by the public to a limited extent, and to give in exchange for it their bills or notes, which, after the 8 & 9 *W.* 3., were payable on demand. There is no general enactment by which the Bank of *England* is protected, even as a bank of issue, against all rival establishments. Particular remedies were applied, as the occasion required, against the effect of competition, and the prohibitory clause in the 6th of *Anne* was introduced for the purpose of providing against a particular mischief, and of restoring to the Bank the privileges which had been invaded by a recent encroachment upon them. The *Irish* act, 21 & 22 *G.* 3., for establishing the Bank of *Ireland*, is *in pari materiâ*, and shews the sense in which the word *borrowing* is used in similar enactments. That act, after reciting that it would tend to the advancement of public credit in *Ireland*, and to the extension of its trade and commerce, if a bank with public security should be established there, enacts that subscriptions to the amount of 600,000*l.*

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should be raised according to the mode in which the Bank of *England* was established. The Company are restrained under a penalty from borrowing or giving security by bill or note for more than this amount. There is also a provision in the act, similar to that in the 6th of *Anne*, "that it shall not be lawful for any body politic or corporate, erected or to be erected, other than the corporation thereby intended to be created or erected into a national bank, or for any other parties whatsoever, united or to be united in covenants or partnership, exceeding the number of six persons, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." So far the language of the 6th of *Anne* is substantially pursued; and the words which follow illustrate the meaning of the legislature — "under a penalty or forfeiture by such persons, bodies politic or corporate, of treble the sum or sums of money so to be *borrowed* or taken up upon such bill or bills, note or notes; one moiety thereof to be paid to the informer, and the other to the use of his Majesty."

It is said that the money for which the bill of exchange is drawn is the money borrowed. Apply that test to the provision in this act of parliament. Suppose a *qui tam* action brought upon this penal statute to recover the penalty. It would be necessary to prove that money was borrowed or taken up upon a bill or note at less than six months' date from the borrowing thereof; and, if a bill of exchange were tendered for that purpose, the action would not be sustained, because a bill of exchange would only prove the sum which is to be paid, and that sum might be totally different from the sum which was borrowed.

About

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About the same time that the Bank of *England* was established exchequer bills were introduced. The government borrowed money directly of the public, and gave their exchequer bills by way of security for the money borrowed. In the same way the Bank of *England* gave its sealed bills and notes, to the extent limited by the act of parliament, by way of security for the money borrowed. The Bank of *England* is a bank of deposit to a very considerable extent as well as a bank of issue; but can it be said to borrow money in its character of a bank of deposit? Is money deposited in the hands of a private banker, in the language of merchants, or according to the common understanding of mankind, a loan to the banker? There is no *borrowing*, in the sense in which alone that word is applicable to the provisions of the Bank acts, in the transaction between the *London* and *Westminster* Bank and Mr. *Muskett*. The only point determined in *Sims* v. *Bond* (*a*), and the cases upon which that decision is founded (*b*), was that money deposited in the hands of a banker is not a bailment. The effect of the deposit of the security in that case was held to be a borrowing, because it was not a bailment. The distinction between a deposit and a borrowing is expressly made by the eighth section of the 3 & 4 *W.* 4. *c.* 98., which requires "that an account of the amount of bullion and securities in the Bank of *England*, belonging to the said Governor and Company, and of notes in circulation, and of *deposits in the said* Bank, shall be transmitted weekly to the Chancellor of the Exchequer for the time being, and such accounts shall be consolidated at the end of every month." According to the argument on the other side, the words ought to have been,

(*a*) 5 *B. & Ad.* 389.

(*b*) *Carr* v. *Carr*, 1 *Mer.* 541. *Devaynes* v. *Noble*, *ibid.* 568.

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been, not "deposits in the said bank," but monies *borrowed* by the said bank.

It is said that, as soon as the *London* and *Westminster* Bank accepted the bill, they owed the money for which it was drawn, and, if there was an owing, there was a borrowing. This is to contend that borrowing means *owing;* and, according to this argument, the prohibition would extend to every acceptance by more than six persons of a bill of exchange, at less than six months, in satisfaction of an antecedent debt. If this be the law, no joint-stock company within sixty-five miles of *London* can accept a bill of exchange, by way of payment for goods sold and delivered, or for a debt due to the drawer. But suppose the bill of exchange to be accepted without consideration, and for the honour of the drawer; will the prohibitory clause then apply? Is such an acceptance an indictable offence within the 6th of *Anne;* and, the foundation of the transaction being that no money is borrowed, and that the bill is accepted without consideration, will the acceptor be liable, under the *Irish* act of parliament, to forfeit treble the sum, which, upon the hypothesis, has no existence?

It is argued that every species of forbearance on the part of one man, whose money passes into the hands of another, constitutes a *loan* within the meaning of the statute of *Anne*, and that, wherever there is a loan, there is a borrowing. A very liberal construction has, no doubt, been put upon the word *loan* in that statute, for the purpose of reaching every usurious transaction; but cases upon the statute of usury have no application to the present question, and the rule of construction which has governed the courts in those cases cannot be extended

tended to a transaction not within the mischief intended to be repressed by giving the fullest effect to the provisons of the 12th of *Anne*.

The third objection taken by the Defendants, and commented upon by the Judges of the Court of Common Pleas, is, that if the word *bills* in the 6th of *Anne* includes bills of exchange, and if the transaction in question constitutes a *borrowing* by the Defendants, still it is not a borrowing on *their* bill within the meaning of the enactment. Against whom was the enactment made? Against the persons who should presume to issue their bills or notes payable on demand, or at less than six months from the borrowing thereof. The acceptors are not the issuers of a bill of exchange. In declaring upon a bill of exchange, the language of the pleader is that the drawer of the bill has made *his* certain bill of exchange. A foreign bill of exchange may be accepted by parol. If the drawee of a foreign bill of exchange makes a parol promise to pay it, and, by so doing, becomes the acceptor, can the bill which continues, perhaps, to be circulated abroad, and which the drawee does not see till the time at which it becomes payable, be said to be *his* bill of exchange? The drawee of a bill of exchange has no interest in or control over it, if he does not accept it, and, if he retains it in his possession, an action of trover lies against him: therefore it is not *his* bill. The acceptor of a bill of exchange, whether by writing or by parol, is not the issuer of the bill; therefore it is not *his* bill within the meaning of this enactment.

The 7 *G.* 4. *c.* 46., which allows partnerships to be established as banks of issue in *London* or elsewhere, under certain conditions, provides, among other conditions, that they shall make a return according to schedule A. The fourth section enacts that before any such

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corporation, exceeding the number of six persons, shall begin to issue any bills or notes, or borrow, owe, or take up money on their bills or notes, an account or return shall be made out according to the form in the schedule marked A. In this schedule the name and places of the bank or banks established by such corporation or co-partnership are to be returned, together with the names of the subscribers, towns, and places where the *bills* or *notes* of the said banking corporation or co-partnership are to be *issued* by the said corporation or co-partnership, or their agent or agents, as the same respectively appear in the books of the corporation or co-partnership. This last provision, requiring a return of the names of the towns and places where the bills or notes of the corporation or co-partnership are to be *issued*, clearly refers to the *issuers* of the bills or notes, not to a co-partnership consisting of more than six persons, who merely accept a bill of exchange in discharge of a debt, or by way of payment for goods or merchandize which they have received. Yet, if the construction contended for by the Plaintiffs could be maintained, every such co-partnership would be liable to the penalties enforced by the eighth section of this act, if they neglected to make the required return.

The time at which a bill of exchange is accepted does not usually appear upon the face of the bill. How, then, assuming borrowing to mean acceptance, is it to be known from what time the six months are to run, where the bill is drawn at more than six months? If a bill were drawn at six months, and accepted on the day on which it was drawn, the acceptance would be legal; but, if accepted within six months of the time at which it became payable, the acceptance would be unlawful; and questions would constantly be raised whether the holder of the bill had notice of the time at which it was accepted.

cepted. Such a state of the law would lead to great inconvenience, and operate as a serious clog on the commercial transactions of the country.

That the transaction impeached by the Plaintiff is not illegal appears from the constant usage of the *East India* Company, and the sanction which that usage derives from a decided case tending strongly to shew that there is no illegality in it.

The 9 & 10 *W.* 3. *c.* 44. *s.* 75. enacts that it shall not be lawful for the *East India* Company to borrow, owe, or give security for any other or greater sum or sums of money than such as shall be really and *bonâ fide* expended and laid out in and for the buying of goods; which sum or sums of money, so to be borrowed for the purpose aforesaid, shall be borrowed only on their common seal, and shall not be made payable or *bonâ fide* agreed to be paid at any time less than six months from the time of the borrowing thereof. Now the *East India* Company is in the constant habit of accepting bills of exchange at less than six months; yet it has never been supposed that by so doing they came within the prohibition of the statute 6 *Ann.* In *Murray* v. *The East India* Company (*a*), an action was brought against the *East India* Company by the administrators of the payee, to recover the amount of four bills of exchange which had been transmitted to *England*, indorsed by the testator's agent without any special authority, and accepted by the *East India* Company after the death of the testator, and paid by the company to the holders. Three of the bills were payable at three months' sight. The amount of the four bills exceeded 30,000*l.* The case was one of great hardship, as the Company was called upon to pay that large

(*a*) 5 *B.* & *Ald.* 204.

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large sum a second time, and every objection that could be raised by the ingenuity of counsel was urged in favour of the Defendants; yet it never occurred to the counsel or to the Court that the acceptance of a bill of exchange at less than six months by more than six persons was void under the 6th of *Anne*, and that the *East India* Company had, consequently, a complete answer to the Plaintiffs' case.

No reference is made in the certificate to any decided case. The cases, indeed, bearing upon this subject are not numerous, nor can the decisions be entirely reconciled with each other; but, with the exception of *Broughton* v. *The Manchester Water Works Company* (for *Slack* v. *The Highgate Archway Company* establishes nothing, one proposition in the marginal note of the case being stated as a *semble*, and another as a *quære*), they are in favour of the defendants. *Broughton* v. *The Manchester Water Works Company*, the case principally relied upon for the Plaintiffs, is not recognised in *Westminster Hall* as an authority. The validity of the acceptance in that case by *The Manchester Water Works Company* was impeached upon two grounds; first, that the corporation, not being constituted for trading purposes, and having no express power to draw and accept bills of exchange, could not be parties to a bill of exchange; and, next, that the acceptance was an infringement of the exclusive privileges of the Bank. The second was only a collateral objection, the privileges of the Bank not being directly in question. Lord *Tenterden* did, undoubtedly, decide the case upon the second ground, but his judgment is not characterised by his usual accuracy, and cannot be fairly cited in support of the argument for the Plaintiffs in this case, because, in consequence of a mistake made by the learned Judge, one of the principal questions which is here in dispute, namely, whether

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ther the word "bill" in the prohibitory clause included a bill of exchange, is assumed to be indisputable. "It is not necessary for me," says Lord *Tenterden*, then C. J. *Abbott*, "to enter into the general question, whether an action of assumpsit will in any case lie against a body corporate, for I am of opinion that this case falls within the provisions of the several acts of parliament made for the protection of the Bank of *England*. The statute by which the Bank was established as a company contains a provision 'that it shall not be lawful for any body corporate to borrow, owe, or take up any sum of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof;' and that clause has been incorporated into all the subsequent acts relating to the Bank of *England*." — Now this clause was not introduced into the act by which the Bank was established, nor into the subsequent acts by which its capital is enlarged, nor until the act 6 *Ann.*, and then to obviate a particular mischief. This mistake is material, because it shews that Lord *Tenterden* was under the impression that the Bank was originally protected and fenced round by a privilege which was not conferred upon it until many years after its establishment. Lord *Tenterden* proceeds: "It seems to me that, by the fair interpretation of that statute, the words 'owe on a bill of exchange' are applicable to those who are liable as acceptors, for such persons are debtors on the bill." — It is manifest that the words "owe on a bill of exchange," which Lord *Tenterden* supposed to be in the act, are not to be found there; the very question which has been so much discussed in the present case being one which, if the words had been what Lord *Tenterden* erroneously supposed them to be, could not by possibility have been raised. For the purposes of the present argument, therefore, *Broughton* v. *The Manchester*

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ter Water Works Company, even if it had been recognized as good law by subsequent cases, could not be fairly used. The question to be proved here having, in that case, been taken for granted upon an erroneous assumption, any inference founded upon that erroneous assumption must fail; for it will scarcely be contended at this stage of the argument that the word "bill" in the prohibitory clause so indisputably means "bill of exchange," that one expression may be substituted for the other, whether in a supposed quotation from an act of parliament or otherwise.

But *Broughton* v. *The Manchester Waterworks Company* is not law. In *Wigan* v. *Fowler* (*a*) Lord *Ellenborough* held that the restrictive clause in the Bank acts extended only to banking companies; and his decision was confirmed by a refusal to grant a new trial. So far as it goes, that case overrules *Broughton* v. *The Manchester Waterworks Company*, and is an authority in favour of the Defendants in the present case, to the extent, at least, of rendering it impossible to grant the injunction now asked for. The circumstance noticed by the Court of King's Bench, in *Broughton* v. *The Manchester Waterworks Company*, as distinguishing *Wigan* v. *Fowler* from the case before them, was not the ground upon which a new trial was refused; on the contrary the Court, in refusing a new trial, went expressly upon the ground that the intention of the legislature was to protect the Bank against rival banking establishments, and not to extend the restriction to commercial partnerships.

The decision in *Wigan* v. *Fowler* was followed by Chief Justice *Best*, in *Perring* v. *Dunston* (*b*), where a promissory

(*a*) 1 *Stark.* 459. (*b*) 1 *Ry. & Moo.* 426.

promissory note at three months, drawn by more than six persons, was held not to be within the prohibitory clause in the bankrupt acts, though *Broughton* v. *The Manchester Waterworks Company* was cited, and Chief Justice *Best* was himself one of the Judges who decided that case. The decision in *Perring* v. *Dunston* was afterwards affirmed by the Court of Common Pleas.

In *Harvey* v. *Kay* (*a*), *Broughton* v. *The Manchester Waterworks Company* being cited in the course of the argument to shew that the Bank acts applied to all companies, for whatever purposes established, Mr. Justice *Bayley* observed, "In *Magor* v. *Hammond* (a special verdict in C. B., argued before the other Judges, but not reported) all the Judges were of opinion that those acts did not prevent more than six persons from paying their debts by their acceptance, but merely prevented more than six persons from carrying on a banking concern."

In *Dickinson* v. *Valpy*, which is reported only on another point (*b*), this question was raised, and the argument upon it not pursued, because the Judges were clearly of opinion that the point had been settled by the decision of all the Judges in *Magor* v. *Hammond*. The action was brought by the indorsee of a bill of exchange for 300*l*., payable at two months, and drawn by the *Cornwall* and *Devonshire* Mining Company. It appears from the short hand-writer's notes, that when the counsel for the Defendants was proceeding to the second point opened by Sir *James Scarlett*, namely, that this bill of exchange was within the prohibition in the Bank acts, Lord *Tenterden* said that a bill of exchange in payment of a debt could not come within the Bank acts.

Mr

(*a*) 9 *B. & C.* 365. (*b*) 10 *B. & C.* 128

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Mr. Justice *Bayley* added, "otherwise any mercantile partnership, consisting of more than a limited number of persons, could not accept a bill of exchange;" and Mr. Justice *Parke* said, "The prohibition applies only to banking companies." Mr. Justice *Bayley* added, "This is implied in the last Bank act;" and Sir *James Scarlett* said he felt this so strongly, that he should be very loth to press the point. Hence it is evident that the decision in *Broughton* v. *The Manchester Waterworks Company*, the case on which the Plaintiffs mainly rely, has been, in effect, declared erroneous by three of the Judges who pronounced it.

Sir *Frederick Pollock*, in reply.

The objection which has been made to the certificate of the Court of Common Pleas, on the ground that the Judges of that Court have not entered into or attributed much importance to the historical details which have formed so large a portion of the argument for the Defendants, is groundless. Those learned Judges confined themselves, and exercised a sound discretion in confining themselves, to the facts stated in the case on which they were called upon to give an opinion, and to the acts of parliament upon which a construction was to be put, instead of wandering into the uncertain region of historical research, and taking, as the Court is now invited to take, the pages of *Anderson*, *Macpherson*, and *Daru*, for their guide. The case opened for the Plaintiffs, and confirmed by the certificate of the Court of Common Pleas, is in no degree displaced or shaken by the arguments which have been urged for the Defendants. It is said that the transaction in question is an ordinary transaction of a bank of deposit, yet no instance is shewn in which a similar attempt has ever been made to infringe the provisions of the 6th of *Anne*. The construction which

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which the Defendants seek to put upon that provision is a novel construction; it has never occurred to any other banking establishment; and it is repudiated by the legislature, which has, in effect, declared the word "bills" in the 6th of *Anne* to be synonymous with bills of exchange. The legislature is the best interpreter of its own language and intentions, and the interpretation of the legislature completely subverts the arguments of the Defendants. The object of the legislature clearly was to prevent the circulation of any negotiable instruments, payable upon the credit of more than six persons, at a less date than six months; and, if bills of exchange at a short date could be circulated by the Defendants, it is clear that the object of the legislature would be defeated. The word "bills," whether we look to the mischief, or resort to contemporaneous exposition, means bills of all kinds, and, consequently, includes bills of exchange. In *Viner's Abridgement* (*a*), it is said that bills of exchange extended at first only to merchant-strangers trading with *English* merchants; and afterwards to inland bills between merchants trading the one with the other here in *England*, and afterwards to all traders and negotiators, and of late to all persons trafficking or not." The statute 3 & 4 *Anne*, which put promissory notes upon the same footing as inland bills of exchange, recognised the capacity of a corporation to be a party to a promissory note; and it followed that, if it might be a party to a promissory note, it might be a party to a bill of exchange. The 6th of *Anne*, therefore, was passed for the purpose of prohibiting all corporations, other than the Bank of *England*, from borrowing, owing, or taking up money upon their bills or notes. In the year 1708, when this statute was passed, the Bank had nearly left off issuing sealed bills which bore interest, and in 1711 it entirely

(*a*) Tit. *Bill of Exchange*, A. 7.

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entirely discontinued them. The seventy-fifth section of the act by which the *East India* Company is established prohibits that corporation from discounting bills of exchange and other bills or notes, the words "other bills" shewing that one kind of bill was a bill of exchange. Where a bill under seal is meant in the acts prior to the 6th of *Anne* it is described as a bill under seal. Thus, in the twentieth section of the act by which the Bank is incorporated, it is provided that the corporation "shall not borrow or give security by bill, bond, covenant, or agreement, under their common *seal*, for more than the whole 1,200,000*l.*" which they were to advance to the government; and, in sect. 29., "all and every bill or bills, obligatory and of credit, under the *seal* of the said corporation, made or given to any person or persons, shall and may pass by indorsement." The same act restrains the Bank from buying and selling goods and merchandize, but does not prohibit them from dealing in bills of exchange. "Bill," which is the general term, includes "bill of exchange," which is one of the species of bills; but where the legislature speaks of a species only, as a bill under seal, or a bill of exchange, or an exchequer bill, it uses the words of addition which define its meaning. Yet, in the teeth of all these instances supplied by contemporaneous statutes and documents, it is gravely insisted that, if the Judges of the Common Pleas had not rejected the principle of contemporaneous exposition, they must have come to the conclusion that, in the 6th of *Anne* and the two prior acts relating to the Bank, the word "bills" could only be understood in the sense of "sealed bills." All that the argument for the Plaintiffs requires to be conceded is that the general term may include one of its particulars — that the whole may include one of its parts — that the word "bills" may mean bills of exchange; and we have shewn numerous instances in which it must do so. The Defendants insist that the general term

term is used exclusively of all its particulars but one — that the word "bills" means "sealed bills" and "sealed bills" only, and the Court will decide how far the proposition for which they contend has been supported by that contemporaneous exposition on which they rely.

As to the cases which, it is said, are in favour of the Defendants, Lord *Ellenborough*, in *Wigan* v. *Fowler*, said, "It was the manifest object of the legislature in framing this act (*a*) to protect the Bank of *England* against rival banks. If a commercial partnership be made a mere colour for the issue of notes, I agree that the case would fall within the prohibition of the statute." It appears from this observation that Lord *Ellenborough* would have considered any interference with the exclusive privileges of the Bank of *England* as a bank of issue, by more than six copartners, whether in a banking or commercial establishment, unlawful; and the question, whether there was or was not such interference, would in every case depend upon the number of the copartners, the shortness of the date for which the bill was drawn, and the circumstances of the particular transaction. The opinion expressed by Lord *Ellenborough* even with these limitations was not followed by the Court in *Broughton* v. *The Manchester Waterworks Company*, a case solemnly argued upon demurrer. The decision in that case remains unshaken by any case where the opinion of the Court has been pronounced upon equal deliberation. The authority cannot be affected by *Perring* v. *Dunston*, another case at *Nisi Prius*; and the allusion which is made to it by Chief Justice *Best* in that case shews that he had not an accurate recollection of the ground upon which it was decided. Chief Justice *Best* said, "The case of *Broughton* v. *The Manchester Waterworks*

(*a*) 15 *G.* 2. *c.* 13.

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Waterworks goes upon the fact of the Defendants being a corporation." Now Chief Justice *Best*, when he sat in the Court of King's Bench, was the only judge who gave any opinion upon that point in *Broughton* v. *The Manchester Waterworks Company;* all the other judges deciding the case upon the ground that it fell within the prohibition in the Bank acts. *Perring* v. *Dunston*, therefore, so far from overruling *Broughton* v. *The Manchester Waterworks Company* proves nothing, but that Chief Justice *Best*, sitting at *Nisi Prius*, mistook the true ground upon which that case was decided. *Magor* v. *Hammond* is not reported; and the *dicta* in *Harvey* v. *Kay* and *Dickinson* v. *Valpy* cannot be considered as overruling or materially affecting the authority of an express decision. As to the argument founded upon the case of *Murray* v. *The East India Company*, it is at once answered by a reference to the 21 *G.* 3. *c.* 65. *s.* 27., and 33 *G.* 3. *c.* 65. *s.* 108., which give to the Directors of the *East India* Company, a special authority to accept bills of exchange, remitted from the Presidencies in *India*. In the first of these provisions the words of the act are "no bill, promissory note, or other obligation for money," another instance, in addition to the various instances already cited, of the word "bill" being used in a sense which necessarily includes a bill of exchange.

It is admitted that the transaction in question, if it were the act of a bank of issue, would be illegal; but it is contended, that being the act of a bank of deposit, which is legalised by the recent act, and a necessary part of the business of such a bank, it is not unlawful. How an act which would be illegal, if the Defendants were a bank of issue, can become lawful, if they call themselves a bank of deposit, it is not easy to understand. It is assumed that the transaction in question is a necessary part

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part of the business of a bank of deposit, this being, in fact, the first attempt of the kind made by a bank of deposit, consisting of more than six partners. It is said that these bills of exchange are orders for payment made by customers; that a cheque is in effect a bill of exchange, and that it is immaterial, whether payment be made to the customer by a cheque or a bill payable at a short date. But is there any borrowing, owing, or taking up where a person presents a customer's cheque at a banker's and receives the money? It is obvious that, if joint-stock banking companies, or joint-stock companies of any description in *London*, could lawfully issue bills of exchange, payable at twenty-one days, the metropolis might soon be inundated with these bills, and there would be an end to that protection for which the Bank has paid so large a consideration to the government, and which has been guaranteed to the Bank by so many acts of parliament. The object of these acts is to protect the bank against all rivalry whatever, not merely against rival banking establishments, but against any persons exceeding six in number, be their trade or business what it may. It is not necessary, however, for the purposes of this injunction, that the privilege should be carried beyond the limits to which the Court of Common Pleas has considered it convenient to confine itself.

The Master *of the* Rolls asked whether the counsel for the Plaintiffs would be content with an injunction to the extent of those limits.

Sir *Frederick Pollock*, after conferring with the other counsel for the Bank —

It is the opinion of the counsel for the Bank that *Broughton* v. *The Manchester Waterworks Company* is

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law and can be sustained. I believe it is the desire of all parties to obtain the opinion of the highest tribunal in the country on the construction of the Bank acts, and that, whatever the decision of this Court may be, the case will be carried to the House of Lords. If this Court grant the injunction, it will grant it upon such terms as it may think proper to impose; but the Bank makes no abandonment of its privileges, which it claims to the fullest extent to which by law it may be found entitled. We shall be content with taking an injunction against the *London* and *Westminster* Company, not in their character of traders generally, but as bankers; but we do not abandon our right of maintaining the privileges of the Bank, if they shall be violated by any number of persons exceeding six, engaged in any trade whatsoever. The main question in this case is the meaning of the word "bill" in the act 6 *Ann.* We submit that, as well upon the natural construction of the word, as upon contemporaneous acts of parliaments, and particularly the *East India* Act, where it is used synonymously with bill of exchange, the word "bill" in the 6th of *Anne* includes bills of exchange. Next we submit that if bills of exchange were not within the immediate contemplation of the legislature in enacting the prohibitory clause — nay, if bills of exchange had even been unknown at that time, and had only been made instruments of commercial circulation since the passing of the prohibitory clause, they are within the mischief intended to be provided against, and, being within the mischief, the meaning of the act of parliament will extend itself and rise up to meet the mischief. We ask, therefore, for the protection to which the Bank is entitled, and for the means of maintaining, by the interposition of this Court, privileges which the legislature has by repeated enactments conferred upon the Bank,— privileges in which undoubtedly the Bank has a deep interest,

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interest, because the public has a much deeper interest in their preservation.

The Master *of the* Rolls, at the close of the argument, said he should take some time to consider his judgment; and, after the intimation at the bar that, whatever might be the result of the present application, it was the desire of both parties to bring this question as speedily as possible before the highest tribunal in the country, his Lordship, considering the great importance of the question, and the inconveniences which might arise from leaving it in doubt, would himself, as soon as the petition of appeal should be presented to the House of Lords, respectfully request the House to give the case a hearing at the earliest time that could conveniently be appointed.

The Master *of the* Rolls. *April* 19.

This case comes before me upon a motion made by the Plaintiffs for an injunction to restrain the Defendants, acting on behalf of the *London* and *Westminster* Bank, from accepting any bill of exchange or promissory note payable at a less time than six months from the date thereof; and from in any other manner borrowing, owing, or taking up in *England* any sum of money on the bills or notes of the said company, payable on demand, or at any time less than six months from the borrowing thereof.

Notice of this motion was first given in *July* 1835: it came on to be heard before me in *March* 1836, and it then appeared that the *London* and *Westminster* Bank was established under the provisions of the statutes 7 *G.* 4. *c.* 46. and 3 & 4 *W.* 4. *c.* 98.; and that, on the 21st day

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of *February* 1835, Mr. *George Frederick Muskett*, who carried on business as a banker at *St. Albans*, under the firm of the "Bank of *St. Albans*," by *Henry Edwards*, his clerk, drew on the *London* and *Westminster* Bank a bill of exchange for 25*l.*, payable to the order of Mr. *Robertson*, twenty-one days after date; and that this bill, drawn at *St. Albans*, and payable at a time less than six months from the date thereof, was on the 23d day of *February* 1835, presented to the *London* and *Westminster* Bank for acceptance in *London*, and was by order of the directors thereof accepted.

It was alleged on behalf of the Bank of *England*, that, regard being had to the provisions of the act 3 & 4 *W.* 4. *c.* 98., and the other acts passed and in force respecting the Bank of *England*, this acceptance was not lawful, and the Bank of *England*, claiming the protection of this Court against the alleged violation of their rights, prayed for the injunction.

It appearing, from the statement and arguments of the counsel for the Plaintiffs, that the legality of the acceptance in question depended upon the legal construction of an act of parliament, or of several acts of parliament, and that the question was of such a nature, and the determination of it of such great importance, that a satisfactory result could scarcely be hoped for, if the decision were made without the assistance of a Court of Common Law, it was suggested by me that a case should be stated for the opinion of a Court of Common Law, and that the motion should stand over till that opinion was obtained.

That suggestion was not willingly acquiesced in by the Plaintiffs; and the Defendants intimated that in their view the legal question ought rather to be determined in an

an action than upon a case stated for the opinion of a Court; but it was not then suggested that an injunction might not be proper, if the acceptance were determined not to be lawful; and, in that state of things, a case (which was settled between the parties themselves) was directed to be made for the opinion of the Court of Common Law.

The learned judges of that Court have returned their certificate, and in doing so have departed from a practice which has long prevailed, and in this Court has been always regretted, of returning their certificate without reasons. They have my respectful thanks for the course which on this occasion they have been pleased to pursue.

They have stated it to be their opinion that, regard being had to the various statutes which relate to the Bank of *England*, a co-partnership consisting of more than six persons carrying on the trade or business of bankers within the distance of 65 miles from *London*, cannot, by law, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of giving such acceptance; and that the transaction described in the case (being the transaction in the course of which the acceptance mentioned in the question was given) appeared to them to be in its nature a banking transaction, and that the acceptance was given in the course of the Defendants' trade or business of bankers—and the certificate is that the acceptance mentioned in the case was not lawful.

Upon that certificate the motion originally made in this Court was renewed, and on the hearing of the renewed motion, the Defendants have thought fit, as

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they had an undoubted right to do, to argue the whole case as to the legality of the acceptance, and the Plaintiffs have not contented themselves with the opinion that the acceptance is illegal as having been made in the course of a banking business, but have argued, as on their part they had a right to do, that the acceptance would have been illegal as having been made on the behalf of more than six persons in partnership together, even if not made in the course of a banking business, and they ask for an injunction founded on that more extended claim.

Upon a careful perusal of the pleadings in this case, and having regard to the nature of the rights claimed by the Bank of *England*, and to the consequences likely to ensue from a violation of those rights, if they exist, I am of opinion that, if the acceptance be illegal, the Plaintiffs are entitled to be protected by injunction against a repetition of such illegal acts; but that, if the illegality depend not merely on the fact of acceptance, but, to some extent, upon the nature of the transaction, or of the circumstances in the course of which the acceptance was given, the injunction ought not to extend to all acceptances upon which the *London* and *Westminster Bank* may owe money, but only to such acceptances as are made or given in the course of the transactions, or under the circumstances upon which the illegality is to some extent dependant. The last act of parliament, affecting the privileges of the Bank of *England*, is the 3 & 4 *W.* 4. *c.* 98, and it is upon the construction of this act that the Plaintiffs principally rely. They say that, according to the true construction of this act, a partnership in *London*, consisting of more than six persons, cannot legally accept a bill of exchange payable on demand, or at any less time than six months from the time of the acceptance thereof.

The

The act, after reciting two former statutes, 39 & 40 *G.* 3. *c.* 28., and 7 *G.* 4. *c.* 46., and enacting that the Bank of *England* shall have such exclusive right of banking as therein mentioned, provides that, during the continuance of the privilege thereby given, no body politic or corporate, and no society, or company, or persons united or to be united in covenants or partnership, exceeding six persons, shall make or issue in *London* any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand, provided, however, that nothing therein contained was to prevent any body politic or corporate, or any society, or company, or incorporated company, or corporation, or copartnership carrying on and transacting banking business at any greater distance than sixty-five miles from *London*, and not having any house of business or establishment as bankers in *London* or within sixty-five miles thereof (except as after mentioned), to make and issue their bills or notes, payable on demand or otherwise, at the place at which the same shall be issued, being more than sixty-five miles from *London*, and also in *London*, and to have an agent or agents in *London*, or at any other place in which such bills or notes shall be made payable for the purpose of payment only; but no such bill or note shall be for any less sum than 5*l.*, or be reissued in *London*, or within sixty-five miles thereof.

It will be observed that this (which is the second section of the act), after first speaking of the bills of exchange and promissory notes, which are not to be made or issued by partnerships of more than six persons, says afterwards that such partnerships, at a greater distance than sixty-five miles from *London*, may make and issue their bills or notes, payable on demand, &c.; and

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and speaks of such bills or notes, &c., in terms which make it appear that, by the words "bills and notes," it is meant to describe bills of exchange and promissory notes.

The third section is that upon which the question in this case principally depends. It is thus expressed, "And whereas the intention of this act is that the Governor and Company of the Bank of *England* should, during the period stated in this act (subject nevertheless to such redemption as is described in this act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of 39 & 40 *G.* 3. *c.* 28., as regulated by the said recited act of the 7 *G.* 4. *c.* 46., or any prior or subsequent act or acts of parliament, but no other or further privilege of banking; and whereas doubts have arisen as to the construction of the said acts, and as to the extent of such exclusive privilege, and it is expedient that all such doubts should be removed, be it therefore declared and enacted that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership do not borrow, owe, or take up in *England* any sum or sums of money on their bills or notes, payable on demand or at any time less than six months from the borrowing thereof, during the continuance of the privilege granted by this act to the said Governor and Company of the Bank of *England*."

If we were to look no further than this act, I think that it could scarcely be doubted that the words "their bills or notes," used in the third section to designate the bills

bills or notes of the partnerships therein described, mean the same sorts of bills or notes of the like partnerships which are mentioned in the second section; viz. bills of exchange and promissory notes.

There is nothing in the language of the third section which appears to me to be opposed to that conclusion. When a man borrows or takes up money on his bills of exchange, it is of every day's occurrence to do that by accepting a bill of exchange drawn upon him by the person from whom he borrows and takes up the money. When he comes to owe a sum of money on his bill of exchange, it is of every day's occurrence that he should do so by accepting a bill for a sum which he had previously taken up or borrowed, or in which he was previously indebted; and in either of these cases, having accepted the bill of exchange, in common parlance and upon the common understanding of mercantile men, he owes or is indebted upon his bill.

In the transaction now in question, the *London* and *Westminster* Bank, a partnership consisting of more than six persons, were the *London* bankers of Mr. *Muskett*, who carried on his banking business at *St. Albans*. On the 23d of *February* 1835, they were indebted to him to an amount exceeding 25*l*. I do not dwell on the pecuniary transactions between banker and customer, it being clear, and in no way denied, that what is commonly called money belonging to the customer in the hands of the banker, in contemplation of law, means no more than a debt due from the banker to the customer. In this state of things, the *London* and *Westminster* Bank, owing more than 25*l*. to Mr. *Muskett*, he draws upon them a bill of exchange, payable in twenty-one days, to the order of Mr. *Robertson*. Whilst this bill was in the hands of Mr. *Muskett* or of Mr. *Robertson*, his

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his payee, without any knowledge of, or any act done by, the *London* and *Westminster* Bank, it is justly said that the relation between that bank and Mr. *Muskett*, whose bill it then was, continued to be wholly unaltered; but, when the bill was presented for acceptance and was accepted, what then became the relation between Mr. *Muskett* and the *London* and *Westminster* Bank in reference to the money payable on the bill? And what was the relation which arose between the *London* and *Westminster* Bank and the payee or indorsee of the bill? Can it be said that the *London* and *Westminster* Bank continued indebted to Mr. *Muskett* in the same manner that they were indebted to him before the acceptance; or that the *London* and *Westminster* Bank did not, after the acceptance, owe money on the bill to the payee or indorsee? Or that the bill accepted by them did not constitute, or, at least, evidence their liability to pay the amount to the payee or indorsee? I conceive that after the acceptance, the bill constituted, or was evidence of, their liability to pay the amount. It was the security they gave for the payment: and I apprehend that an acceptance given under such circumstances is, in ordinary language, called the bill of the acceptors; and that the amount payable on the bill is money owing by the acceptors, who are, in law, the persons primarily liable to pay.

And it does not appear to me that the use which is made of the words "from the borrowing thereof" occasions any material difficulty. It is probable that, in its first application to pecuniary transactions, the word "borrow" meant to secure the repayment of a sum lent; but, however this may be, in the phrase "borrow, owe, or take up," I think that the words "owe or take up," are put in apposition with the word "borrow" for the purpose of explanation. "Owe or take up" are used as

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as expository for the purpose of preventing the narrow construction which without them might have been given to the word "borrow," and taking the word "owe" as part of the sense in which the word "borrow" is used, "from the time of borrowing," means from the time of owing on the bills or notes referred to, or, in the case now under consideration, from the time of accepting the bills.

The arguments for the Defendants were distinguished by great learning and ability, and by great historical research. It was contended that the learned judges of the Court of Common Pleas had not sufficiently attended to the nature of a bank, or to the difference between banks of issue and banks of deposit; and had, consequently, applied to this case and to these Defendants, who carry on the business of a bank of deposit only, arguments and reasons which can properly be applied only to persons carrying on, and transactions forming part of the business of a bank of issue; and further, that the acceptance of bills of exchange is necessarily incident to, and forms part of, the business of a bank of deposit; that acceptance of bills of exchange by persons carrying on the business of banks of deposit, cannot produce any of the consequences or mischiefs which the Bank acts were intended to guard against; and that they could not have been intended to be comprised in the prohibition of the statute made in the 6th year of Queen *Anne*, which first contained the words under which the Bank of *England* now claims protection.

To the arguments offered in support of these positions I have given the best attention in my power; but it does not appear to me that the judges made any oversight or mistake in their view of the nature of banks or banking business, or of the business carried on by the Defendants at

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at their banks; and, though it may be that the business of a bank of deposit cannot be so conveniently or profitably carried on under a prohibition to accept bills of exchange payable on demand, or at very short dates, yet it cannot be correctly said that, without accepting such bills of exchange, the business of a bank of deposit cannot be carried on at all or to a very considerable extent. The legislature appears to have had two objects in view—to permit banks of deposit to be established by numerous partners in *London*, and at the same time to protect the Bank of *England* and the general circulation; and if, in the endeavour to effect both these objects, the numerous partners allowed to establish banks of deposit in *London* have been forbidden to accept bills of exchange payable on demand or at short dates, there does not appear to be any inconsistency in the enactment. It is no argument against the existence of the prohibition that the persons, who are affected by it, would be able to transact their business more conveniently or profitably without it. They cannot argue from the inconvenience which they find in the restriction to the non-existence of the law; and there is, I think, no such inconsistency or unreasonableness in the restriction as to make it improbable that the legislature meant to impose it. And with respect to the consequences against which the Bank acts were intended to guard, although it must be admitted that the issue of promissory notes affords a more simple and easy mode of producing them, yet it cannot be seriously doubted that the issue of acceptances of bills of exchange for small sums payable on demand or at short dates, might produce those consequences which the Bank acts contemplated as mischiefs, and from which it was intended to protect the Bank.

But the argument most enlarged upon before me related to the effect of the prohibition as, at first contained in

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in the statute of the 6th of *Anne*. It was said that the last act, the 3 & 4 *W.* 4. *c.* 98., did not give and was not intended to give any new privilege to the Bank of *England*, but was only intended to continue the privilege conferred by the former acts, and that, if we go back to the first statute and look at contemporaneous history for contemporaneous exposition, we shall find that the enactment by which partnerships, consisting of more than six persons, were prohibited from borrowing, owing, or taking up money on their bills or notes payable on demand or at any time less than six months from the borrowing thereof, could not have comprised acceptances of bills of exchange.

But I am not of opinion that we are to look at the statute of *Anne* and the circumstances contemporaneous with the passing of that act alone, without regarding the series of subsequent acts and the sense which has been put upon the words of the act in subsequent times. When we find an enactment relating to a mercantile transaction in the year 1707, and another enactment in the same words in the year 1833, the proposition that the words in the two enactments must be expounded in precisely the same manner must be received with some limitation. In the continual fluctuations which take place in the use of words and in the nature of mercantile transactions, it may happen that, having regard to the common use of the words and the nature of transactions usual at two periods of time remote from one another, the same words may have a rational and well understood application to a particular sort of transaction at the prior period, and to a transaction somewhat varying from the former at the subsequent period. The object of construction is to discover the intention of the legislature at the time when the enactment is made. The contemporaneous exposition, which is to determine the rights of parties at this time

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time is that which shews the meaning of the last statute; and, although it is proper on many accounts to consider the effect of the statute of *Anne*, yet the object we have in view on this occasion is to ascertain the effect of the act of the 3 & 4 *W.* 4., and it is manifest that we look at the former acts only for the purpose of obtaining, if we can, a better construction of the latter.

Now the act 3 & 4 *W.* 4. *c.* 98. recites the two former acts of 39 & 40 *G.* 3. *c.* 28. and 7 *G.* 4. *c.* 46. The 39 & 40 *G.* 3. has the same words upon which the question arises, "It shall not be lawful for any body politic or corporate, or for any other persons, united in covenants or partnerships exceeding the number of six persons in *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof, during the continuance of the privilege of the Governor and Company of the Bank of *England*."

The stat. 7 *G.* 4. *c.* 46., after reciting the next preceding act, then recites that the Bank of *England* had consented to relinquish so much of their exclusive privilege as prohibited any body politic or corporate, or any number of persons exceeding six in *England* acting in co-partnership, from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof, provided that such body politic or corporate, or persons united in covenants or partnerships exceeding the number of six persons in each partnership, shall have the whole of their banking establishment and carry on their business as bankers at any place or places in *England* exceeding the distance of 65 miles from *London;* and that all the individuals, composing such corporations or co-partnerships, carrying on such

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such business shall be liable to or responsible for the due payment of all bills and notes issued by such corporations, and co-partnerships respectively. The act then proceeded to authorise corporations and partnerships consisting of more than six persons to carry on the trade or business of bankers at places, exceeding the distance of 65 miles from *London*, on the terms and conditions therein mentioned; and, at the places where they were to carry on the business, it was made lawful for them to make and issue their bills or notes payable on demand, and to borrow, owe, and take up any sum or sums of money on their bills or notes, so made and issued; and all members of the corporation or partnership were made liable for the due payment of all bills and notes which should be issued, and for all sums of money which should be borrowed, owed, or taken up by the corporation or co-partnership of which the person should be a member at the date of the bills or notes, or become so before the time of the bills or notes being payable, or whilst any money was due or unpaid on the bills or notes.

The second section authorised such corporations or co-partnerships to draw bills of exchange for sums amounting to 50*l.* and upwards, payable in *London*, or elsewhere, at any period after date or after sight; but prohibited them from issuing or re-issuing in *London*, or within 65 miles from *London*, any bill or note of such corporation or co-partnership payable to bearer on demand, or any Bank-post bill, or to draw on any partner or agent or other person in *London*, or within 65 miles from *London*, any bill of exchange payable on demand, or for a less sum than 50*l.*

The third section provides that nothing therein contained shall authorise any corporation or co-partnership consisting of more than six persons, carrying on the

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business of bankers, or any member or agent of any such corporation or co-partnership, to borrow or take up in *London*, or at any place not exceeding the distance of 65 miles from *London*, any sum of money on any bill or promissory note of any such corporation or co-partnership payable on demand, or at any time less than six months from the borrowing thereof; nor to make or issue any bill or bills of exchange, or promissory note or notes, of such corporation or co-partnership, contrary to the provisions of the 39 & 40 *G.* 3., save as provided by this act in that behalf; provided also, that nothing therein contained should extend to prevent any such corporation or co-partnership, by any agent or person authorised by them, from discounting in *London* or elsewhere any bill or bills of exchange not drawn by or upon such corporation or co-partnership, or by or upon any person on their behalf.

The nineteenth section of the same act imposes a penalty upon any violation of the prohibition contained in the second and third sections, and assumes, as the third section does, that making or issuing bills of exchange or promissory notes might be contrary to the provisions of the 39 & 40 *G.* 3.

There is, therefore, nothing in this act to throw any doubt upon the meaning of the words "borrow, owe, or take up, any sum or sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof." The same words are found in the 39 & 40 *G.* 3. *c.* 28., and in the stat. 3 & 4 *W.* 4. *c.* 98; and with reference to the words, as contained in the 39 & 40 *G.* 3. *c.* 28, the provisions of the 7 *G.* 4, are enacted, and by those provisions it appears that, when that act was passed, the legislature considered that acceptances, made by a partnership carrying

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carrying on business as bankers, were within the meaning of the words. It was thought necessary to give leave to draw bills of exchange for 50*l.* on an agent in *London*, and to provide that the corporations or partnerships should not make or issue bills of exchange contrary to the provisions of the 39 & 40 *G.* 3., save as the act authorised; and lest this general prohibition should prevent the discounting in *London* of bills drawn by or upon other persons, a special proviso to prevent that consequence was introduced. It is argued that, upon the true construction of the 39 & 40 *G.* 3., the acceptance of bills of exchange by a banking company consisting of more than six persons, was not prohibited; that the effect attributed to that act in the 7 *G.* 4. was erroneous, and that such an erroneous attribution could not make a new law; and that, from the expressions contained in the schedule, it ought not to be inferred that the acceptance and delivery of a bill was considered to be an issuing of such bill. But what we are endeavouring to do is to discover the true intention and effect of the words contained in the act 3 & 4 *W.* 4.; and, upon a consideration of the stat. 7 *G.* 4., I find nothing from which I think I ought to infer that the words of the 3 & 4 *W.* 4. ought not to be construed according to that which appears to me to be their more obvious meaning and effect at this time. And when it is observed that, at the time when the 7 *G.* 4. was passed, the legislature considered that the words in question did comprise acceptances of bills of exchange, and that the enactment of the stat. 3 & 4 *W.* 4. *c.* 98 was a re-enactment in the same words, made for the purpose of removing doubts as to the situation of the persons who are enabled to establish banks of deposit under the 7 *G.* 4., it seems scarcely reasonable to suppose that, when the act 3 & 4 *W.* 4. *c.* 98 was passed, the legislature did not mean the same words to

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have the same effect which was attributed to them by the 7 *G.* 4.

It is said, however, that, if we go back to the origin of this enactment we shall find that, before the statute of *Anne* was passed, corporations were in the habit of raising or projecting to raise capital by borrowing or taking up money on their sealed bills — sealed bills of credit, or of debt or charge, and that partnerships, not being corporations, might have made such sealed bills by actually affixing the seals of all the members to such bills, or to powers of attorney enabling their officers to seal such bills on their behalf; and, because such things were or might have been—because the borrowing money by partnerships of more than six persons on sealed bills payable on demand was forbidden under the words of the statute of *Anne*, it is argued that the borrowing money by such partnerships on any other bills payable on demand was not forbidden either by that statute or any other of the similar enactments passed in subsequent times, since sealed bills have ceased to be in use, and the word "bills" in the enactment could have no application at all, if it were not applicable to bills which were not sealed bills; and it is further argued that acceptances of bills of exchange could not have been meant to be comprised in an expression so strange, uncertain, ambiguous, and inapt for the purpose. I wish that acts of parliament were generally expressed in a manner so clear, certain, and unambiguous, as to make this argument more cogent than I can consider it to be. We are to give the best construction we can to the words as we find them; not to reject words, because they create a difficulty, nor to strain them to a sense they will not properly bear. And looking at the words of the statute of *Anne* with the light afforded by the

the contemporaneous, history which the Defendants have brought to bear upon them, and considering the same words with reference to the several acts of parliament, nearly contemporaneous, which have been cited, it appears to me, for the reasons stated by the Court of Common Pleas, and which I need not repeat, that the expression of "bills and notes" in the statute of *Anne*, may with more propriety of construction be held to comprise bills of exchange, than be confined to bills under seal; and supposing this to be attended with more doubt than it appears to me to be, though I do not think it free from doubt, yet considering the avowed object and purpose of the enactment — the obvious means by which that object might be defeated — the plain intention of the legislature to prevent the employment of such means — the understanding which has at all times prevailed as to the meaning of the enactment, and the repeated re-enactment of the same clause in the same words in subsequent times, when it was clear, that unless the word "bills" comprised bill transactions of the nature of that now in question, it would have no effect at all that was not delusive, I cannot avoid concluding that, upon the true construction of all the acts, they do prohibit bankers in partnerships of more than six persons from borrowing, owing, or taking up money, in the course of their banking business, on their acceptance of bills of exchange payable on demand, or at less time than six months from the acceptance thereof.

I, therefore, concur in the opinion given by the Court of Common Pleas. It is truly observed upon it, that it does not decide many most important questions respecting bills of exchange, which may or may not be accepted by persons carrying on the business of banks of deposit. There are, indeed, many such questions which cannot be decided on this motion; some perhaps which are

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more fit for settlement by the legislature than by courts of justice, which can only proceed upon the particular facts appearing in the particular cases which come before them for decision. If the law applicable to those facts can be ascertained, it is the duty of the courts to make the application, notwithstanding the suggestion of other cases which may create difficulty, and notwithstanding that some embarrassments may arise from its application to the particular cases before them.

Thinking it not lawful for the *London* and *Westminster* Bank, in the course of their business as bankers, and as part of their banking business, to accept bills of exchange, payable on demand, or at less time than six months from the acceptance thereof; and finding that an act of that sort has been done, and that the Defendants claim to be entitled to make such acceptances, as part of their business as bankers, I am of opinion that the Plaintiffs are entitled to an injunction to restrain the Defendants from repeating such acts.

It is another question, whether the Plaintiffs are entitled to the more extensive injunction which they claim by their notice of motion, and which they have insisted on at the bar. Upon perusal of the Bank Acts, I think that the object of the legislature was, from time to time, to impose restrictions on persons carrying on the business of bankers; and, on the present occasion, I do not think it necessary to give any opinion whether the words which have been used are or are not extensive enough to apply to transactions, not the transactions of bankers, or of bankers in the course of their banking business. That may be a question to be hereafter determined; but at present no such transaction appears to have taken place, and I do not think that, upon such a motion

motion as this, I ought to make the injunction more extensive than the facts which have occured appear to me to make it necessary for the protection of the Plaintiffs.

And I therefore order that an injunction be awarded to restrain the Defendants, their agents, clerks, and servants, acting for or on behalf of the company or partnership, called the *London* and *Westminster* Bank, in the course of their trade or business as bankers, from accepting or causing to be accepted, any bills or bill of exchange, payable on demand, or at any time less than six months from the time of the acceptance thereof.

A petition of appeal was presented to the House of Lords, but was not prosecuted, the Defendants acquiescing in the decision of the Master of the Rolls.

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A., by his marriage settlement, conveyed his real estates to trustees and their heirs, to the use of himself for life, with remainder to the same trustees, to preserve contingent uses; and after the death of *A.* to other trustees for a term of years, to secure a jointure for his wife, with remainder to the use of such children of the marriage as the husband and wife jointly, and in default of a joint appointment, the survivor of them should appoint, with remainder, in default of any appointment, to all and every the sons and daughters of the marriage living at the death of the survivor of the husband and wife, and the children (also living at such period,) of such sons and daughters as should be then dead, in equal shares, as tenants in common, with remainder to the right heirs of the settlor.

A. became bankrupt before he had made any appointment. After his bankruptcy he and his wife executed a deed, purporting to be a joint appointment, and, after the death of the bankrupt, and subsequently to the filing of the bill, his widow executed a deed, purporting to be an appointment to the same children in whose favour the joint appointment had been made.

Held, that the joint power was destroyed by the bankruptcy, and that, the contingent limitation to the children in default of appointment having failed for want of a particular estate of freehold to support it, the appointment by the surviving wife was invalid.

BY an indenture dated the 8th of October, 1804, and made, on the marriage of *Hugh Escott* and *Margaret* his wife, between *Hugh Escott* of the first part; *Margaret Dods*, afterwards his wife, of the second part; *James Newton* and *William Leigh* of the third part; and *Thomas Escott* and *George Henry Leigh* of the fourth part, *Hugh Escott* conveyed the real estates therein described to *James Newton* and *William Leigh* and their heirs, after the solemnization of the marriage, to the use of *Hugh Escott* and his assigns for his life, without impeachment of waste, with remainder to the use of the same trustees during the life of *Hugh Escott*, in trust, to preserve the contingent uses and estates thereinafter limited; and after the death of *Hugh Escott*, to the use and intent that the wife might receive and take an annual rentcharge of 50*l.* during her life, and subject thereto, to the use of *Thomas Escott* and *George Henry Leigh*, their executors, administrators, and assigns, for a term of 2000 years, to commence on the death of *Hugh Escott*, upon the trusts thereinafter declared concerning the same,

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same, with remainder to the use of such child and children of the marriage for such estates, and in such shares, and in such manner, and form, and with, under, and subject to such provisos, conditions, restrictions, and limitations over, such limitations over to be for the benefit of some or one of the children of the marriage, as the husband and wife at any time or times during their joint lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, in manner therein mentioned, should direct or appoint; and in default of any such direction or appointment, and until such estate and estates so directed or appointed should respectively commence and take effect, and after such estate and estates so directed, or appointed, should respectively end or determine; and as to such part or parts thereof, whereof no such direction, limitation, or appointment should be made, to the use of such child and children of the marriage for such estates, in such shares, and in such manner and form, &c. as the survivor of the husband and wife should by deed or will, in manner therein mentioned, direct or appoint; and in default of such direction or appointment, to the use of all and every the sons and daughters of the marriage, living at the decease of the survivor of the husband and wife, and all and every the child or children also living at that period of such sons and daughters as should happen to die before the death of such survivor, (such children to take *per stirpes*,) to be divided equally between them, share and share alike; and in default thereof, to the use of the right heirs of *Hugh Escott*, for ever. And as to the term of 2000 years, it was declared that the same was limited for better securing the jointure of 50*l*.

In the year 1825, *Hugh Escott* became a bankrupt, and his interest under the settlement was, in the month of *June* 1826, put up for sale by his assignees. The estates comprised

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comprised in the settlement were purchased by *Clement Poole*, who died before any conveyance was executed, having by his will devised the purchased estates to the Plaintiff *William Hole*, upon certain trusts.

By an indenture dated the 12th of *April* 1831, the purchased estates, and all the interest of the bankrupt therein, were conveyed by the assignees to the Plaintiff *William Hole* and his heirs upon the trusts of the will of *Clement Poole*.

No appointment was made in pursuance of the power given by the settlement before the year 1825, when *Hugh Escott* became bankrupt; but on the 25th of *May*, 1831, the bankrupt and his wife executed a deed, purporting to be a joint appointment made in pursuance of the power, in favour of two of their children, *John Escott* and *Jane Elizabeth Escott*, as tenants in common, in fee, subject to a charge of 500*l.*, for the benefit of the other children of the marriage.

In *March*, 1834, *Hugh Escott* died, leaving his wife surviving him; and upon his death, *John Escott* claimed, in behalf of himself and his sister *Jane Elizabeth Escott*, to be entitled to the property, conveyed to the Plaintiff *William Hole*, and entered into possession of it.

The bill was filed by *William Hole*, and parties interested under the will of *Clement Poole*, who insisted that the appointment by the bankrupt and his wife was void, as against the assignees under whom the Plaintiffs claimed, and that the contingent limitation in the settlement to the children of the marriage, in default of appointment, was void for want of a particular estate of freehold to support it; and the bill prayed that the Plaintiff *William Hole* might be declared entitled to an absolute fee-

fee-simple in the property, subject to the jointure of 50*l.*, and to the term of 2000 years for securing the same; and that, if necessary, the said term might be set aside, to enable the Plaintiffs to enforce their right at law, and that the Defendants might account for the rents and profits received by them since the death of *Hugh Escott*.

After the filing of the bill, the widow executed a deed, purporting to be an appointment in exercise of the power, to the same children in whose favour the joint power had been executed.

The questions in the cause were, first, whether the joint power of appointment by the husband and wife was destroyed by the bankruptcy of the husband; secondly, whether, the limitation to the children in default of appointment being contingent, and there being no particular estate of freehold, upon the death of the husband, to support it, the separate power of appointment by the wife was capable of being exercised.

Mr. *Pemberton*, Mr. *Kindersley*, Mr. *West*, and Mr. *Chandless*, for the Plaintiffs.

The first question is, whether, the joint power of appointment not having been exercised before the bankruptcy of the husband, that power was not extinguished; and this question may be considered as determined by the case of *Badham* v. *Mee* (*a*), unless it can be shown that a power which, if given to A alone, would be extinguished by his bankruptcy, may, if given to A and another person, be exercised by them jointly after the bankruptcy of A. The effect of bankruptcy upon powers vested

(*a*) 7 *Bing.* 695.; 1 *Moore & Scott*, 14.; and 1 *Mylne & Keen*, 32.

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vested in the bankrupt previously to his bankruptcy is a subject which has been much discussed, but which may now be considered as settled by legislative interposition, or by decision. A power simply collateral, that is, a a power to be exercised simply for the benefit of persons other than the donee of the power, and not coupled with any interest in the donee himself, cannot be extinguished or released, and upon such a power it is obvious that the bankruptcy of the donee can have no effect.

In *Thorpe* v. *Goodall* (*a*), Lord *Eldon* expressed an opinion, that, as the law then stood, a bankrupt could not be compelled to execute for his creditors a power which he might have executed for his own benefit; and in consequence of that opinion a provision was introduced into the bankrupt laws, enabling assignees to execute all powers vested in any bankrupt, which he might legally execute for his own benefit. But where a power was coupled with an interest, and to be exercised for the benefit of a limited class of objects, it was long considered a doubtful question whether it could be released or extinguished; and, if it could not be released or extinguished, such a power might be exercised by the donee, notwithstanding his bankruptcy. In *West* v. *Berney* (*b*), and in *Smith* v. *Death* (*c*), Sir *John Leach* decided, upon much consideration, that such a power might be released or extinguished. The decision in *Smith* v. *Death* (*c*), was followed by Sir *Thomas Plumer* in *Horner* v. *Swann* (*d*), and established the doctrine that any power, not simply collateral, but coupled with an interest, might be released or extinguished by the grantee. His decision laid a foundation for determining the question, whether bankruptcy would operate as an extinguishment of a power coupled

(*a*) 17 *Ves.* 388.
(*b*) 1 *Russ. & Mylne*, 431.
(*c*) 5 *Mad.* 371.
(*d*) *Turn. & Russ.* 430.

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coupled with an interest and vested in the bankrupt before his bankruptcy. That point arose in the case of *Badham* v. *Mee*, where a father was tenant for life, under a settlement made by himself, with remainder to such of his sons as he should appoint, subject to charges for the other children, with remainder, in default of appointment, to the sons successively in tail, with remainder to the father in fee. The father became bankrupt, and after his bankruptcy executed a deed, purporting to be an appointment, by which he gave to his eldest son an estate in fee. The Court of Common Pleas, upon a case directed by the Master of the Rolls, certified that the eldest son of the bankrupt took no estate under the appointment, but, under the settlement, took an estate tail, expectant upon the determination of the life estate of the father. The certificate of the Court of Common Pleas was, after an elaborate argument, confirmed by the Master of the Rolls. (*a*) It may be said that, as the grounds upon which the court of law came to its conclusion did not appear in the certificate, and as the Master of the Rolls confirmed the opinion of the Court of Common Pleas upon a ground, which left the principal question, as to the destruction of the power, untouched, it is still open to contend that bankruptcy does not extinguish a power coupled with an interest in the bankrupt. But where a life estate and the ultimate reversion are in the donee of a power who becomes bankrupt, which was the case in *Badham* v. *Mee*, as well as in the present case, any appointment which the bankrupt may attempt to make in favour of his issue must derogate from the reversion, which, by operation of law, is vested in the assignees, and, as no man can derogate from his own grant, any such appointment must be bad. If, therefore, he can make no valid appointment

(*a*) 1 *Mylne & Keen*, 32.

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ment under the power, the power is extinguished. The present case differs from *Badham* v. *Mee*, inasmuch as the power given by the settlement is joint; but if bankruptcy extinguishes a power given to the bankrupt alone, it seems impossible to contend that it will not render invalid an appointment attempted to be made by a bankrupt jointly with another person. Sir *Edward Sugden* (*a*), in the last edition of his treatise on Powers, expresses disapprobation of the decision in *Badham* v. *Mee*, but upon a ground which does not apply to the present case. In *Badham* v. *Mee* there was in the settlement an intermediate limitation, in default of appointment, to the first and other sons in tail, between the bankrupt's life estate and his ultimate reversion; so that, if the power of selection among his children, given to the bankrupt, were defeated, as it was declared to be by the decision, the interest of the assignees was not accelerated, because, if the eldest son did not take a base fee, determinable upon the failure of the issue in tail, which was all that was contended for by those who argued for the validity of the appointment, he would still take, and was held to take, as tenant in tail under the settlement. Sir *Edward Sugden* argues, therefore, that the bankrupt law ought not to be held to destroy powers in a family settlement, where their existence, and the exercise of them, do not affect the rights of the creditors; he admits that the appointment made by the bankrupt was void, as against the assignees, but insists that it was good so far as it could be supported consistently with the limitations in the settlement to the issue in tail. In *Badham* v. *Mee* there was a valid limitation prior to the bankrupt's reversion; here the limitation to the children in default of appointment is void for want of a particular estate of freehold to support

(*a*) vol. i. p. 80. 6th edit.

support it; and, if void, the next question is, whether the separate power of appointment by the survivor of the husband and wife was capable of being exercised.

That the limitation in default of appointment to the children and their issue, living at the death of the survivor of the husband and wife, was a contingent remainder, is clear; first, because it was limited to persons not in being, and who, if they came into *esse*, might not exist at the time when the limitation was to take effect; secondly, because it was liable to fail from the want of a particular estate to support it, an event which has actually happened by the death of the husband in the life-time of the wife, to whom no estate is given by the settlement. This remainder was void *ab initio*, because it is limited to take effect on the death of the survivor of the husband and wife; an event which might happen after the failure of the particular estate, which has, in fact, failed; and it is a rule that a contingent remainder must be so limited as to take effect, if at all, at the moment when the particular estate determines. Here it is so limited that it cannot take effect at that time. The contingent limitation being for this reason void, it follows that the power given to the survivor by the settlement cannot be exercised by the widow. To try the validity of the estate appointed by the widow, it must be read as if it had been contained in the original settlement. Assuming the joint appointment to be bad, the limitations would then stand to the husband for life, and four years after the death of the husband to the two children appointed by the widow. This last limitation would be clearly bad as a remainder, and it cannot operate by way of springing use; for, if the husband had survived the wife, the limitation under the power might have taken effect by way of remainder; and it is a rule, subject to no exception, that where a limitation may take effect

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effect as a contingent remainder, it shall never operate as a springing use, *Purefoy* v. *Rogers* (*a*), *Carwardine* v. *Carwardine* (*b*), *Fearne's Contingent Remainders.* (*c*) A use, which may be construed as a remainder, cannot be supported as a contingent use, though actually void in its creation if not so considered, *Gilbert on Uses and Trusts.* (*d*); and, if it is possible to construe a limitation as a remainder, the mere improbability that it will take effect as a remainder will not take it out of the rule. In this case the probabilities that it would take effect as a remainder may be taken to have been equal.

It has been decided by Lord *Thurlow* that a joint appointment cannot be considered as an appointment by the survivor, because, at the time of the appointment, the survivor was not ascertained, *M'Adam* v. *Logan* (*e*).

Sir *William Follett* and Mr. *Griffith Richards, contrà.*

The first question is, whether the joint power given by the settlement to the husband and wife was well executed; and, with reference to that question, it is material to consider the intention of the parties to the settlement. This was a settlement made by the owner of the estate, in contemplation of his marriage, by which he contracted that the children of the marriage should have the property at the death of their parents. This is the evident intention of the settlement, to be collected from the deed itself; and if, by an accidental omission, the settlement has failed to effectuate that intention, it may be reformed by this Court. It is said that the power is extinguished by the bankruptcy of the husband.

(*a*) 2 *Saund.* 380.
(*b*) 1 *Ed.* 27.
(*c*) p. 388, *& seq.*
(*d*) *Sugd.* edit. p. 167.
(*e*) 3 *Bro. C. C.* 310.

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band. But the bankrupt laws do not affect family settlements, except so far as such settlements provide for the interest of the bankrupt; and here the power is to be executed, not for the benefit of the bankrupt, but for his children. This is a joint power; but supposing it to be a single power, how is it destroyed by the bankruptcy? A bargain and sale is an innocent conveyance: the bargain and sale of the commissioners, therefore, would not destroy it. It may be doubted whether even a tortuous conveyance, such as fine or recovery, would destroy a single power; it certainly would not destroy a joint power. In *Edwards* v. *Slater* (*a*), a tenant for life, under a settlement, with remainders in tail, and the ultimate reversion to the tenant for life, bargained and sold the lands by deed enrolled, and took back a re-conveyance by feoffment. He had a power under the settlement which he afterwards exercised, and it was held that though the bargain and sale passed away the life estate and the reversion, yet, being an innocent conveyance, it did not affect the power, or the estates tail to which the power was collateral. In *Long* v. *Rankin* (*b*), it was held that the alienation by the tenant for life by lease and release with a reservation that a power of leasing might be exercised did not destroy the power. But it is said that the bankrupt cannot derogate from his own grant. The right of the assignees is founded upon the seventy-seventh section of the 6 *G.* 4. *c.* 16., which clause was introduced into the bankrupt laws in consequence of the decision of Lord *Eldon* in *Thorpe* v. *Goodall.* (*c*) Under that provision every interest of the bankrupt and every power which he might have executed for his own benefit passes to the assignees. But here the question is, whether

(*a*) *Hardres*, 410.
(*b*) *Sugd. Powers, Append.* 2.
(*c*) 17 *Ves.* 388. *S. C.* 1 *Rose*, 40.

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whether a power which by the bankrupt's own solemn act in a marriage settlement is to be executed, not for his own benefit, but for the benefit of his children, can be destroyed by the bargain and sale. The assignees take the estate subject to the power, and therefore the execution of it is no derogation from their interest. The bargain and sale, *qua* conveyance, will not extinguish the power: and, unless there is an express provision in the bankrupt act, declaring that the bankrupt shall not execute the power after the bargain and sale, the power remains. There is no such provision in the bankrupt act. The assignees stand in the same situation as an ordinary purchaser, and could an ordinary purchaser, without any stipulation as to the exercise of the power, prevent the donee from appointing? These arguments apply to the case of a separate power; they are much stronger in the present case, where the power was to be exercised by the bankrupt jointly with his wife.

This is a settlement made for good consideration. Suppose the limitations under the joint appointment had been inserted in the settlement, could the assignees then have avoided them? They are now inserted in pursuance of a bargain made for good consideration before the bankruptcy. It is said that the bankrupt cannot derogate from his own grant. If that argument is to prevail, how much more would the bankrupt's grant to the assignees derogate from his prior contract in favour of his children, than the appointment would derogate from the grant to the assignees?

So the case stands upon principle, and does the argument for the destruction of the power rest upon any authority? The Bankrupt act is silent upon the point, and the single decided case that is relied upon has been universally

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universally disapproved of. *Thorpe* v. *Goodall* shews that powers were unaffected by bankruptcy previously to the provision in the statute. In *Doe dem. Coleman* v. *Britain* (*a*), the bankrupt, previously to his bankruptcy, had the entire ownership of the estate which was conveyed to him by the common uses to bar dower, namely, to himself for life, remainder to a trustee during his life in trust for him, remainder to such uses as he should appoint, remainder to himself in fee; and it was held that, after his bankruptcy, he could not appoint against his assignees. In that case there was no power to be executed for the benefit of a class, or of children entitled under a marriage settlement; but the whole interest was in the bankrupt himself. In *Badham* v. *Mee* the argument in the Court of Common Pleas was put upon two grounds; first, that the power was extinguished by the bankruptcy; and secondly, that if not extinguished, the estate created by the appointment, or that which might be substituted for it, would not have been valid, if limited in the deed creating the power. The Court, without hearing the argument in reply on the first point, desired the counsel for the plaintiff to confine himself to the second point; and it was conjectured that the certificate of the Court was founded upon their opinion that the limitation, contended for under the appointment, would have been bad if introduced into the settlement. When the case came back to be argued before the Master of the Rolls, his Honor noticed this circumstance, and he confirmed the certificate of the Court of Common Pleas, not upon the ground that the power was destroyed by the bankruptcy, but because he concurred with the Judges of the Court of Common Pleas upon the other point, which rendered it unnecessary to decide the general question. "It is conjectured," says

(*a*) 2 *B. & Ald.* 93.

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says Sir *John Leach* in his judgment (*a*), "from an observation made by one of the Judges in the course of the argument, that the Court of Common Pleas decided against the validity of the appointment upon the ground that, by the execution of a power, no estate can be created which would not have been valid, if limited in the deed creating the power. If, therefore, it were admitted that the power of appointment continued in the bankrupt notwithstanding his bankruptcy, and that the appointment in favour of the eldest son in fee might be construed as an appointment creating a base fee only, and not prejudicing the remainder which passed to the assignees under the commission, the appointment would nevertheless be void, because a limitation to that effect would have been void in the original deed creating the power, inasmuch as the rule of law does not permit one fee to be limited after another, although the first fee be only a base or determinable fee. This rule applies to the present case, in which the donee has a particular and a general power, and will support the opinion which has been formed by the Judges of the Court of Common Pleas. As I confirm the opinion of the Court of Common Pleas upon this point, it is unnecessary that I should express any opinion on the other views of the case which have been taken in the argument at the bar." The general question, therefore, as to the destruction of powers by bankruptcy remains untouched by this, or any decision. It is said that Sir *Edward Sugden*'s disapprobation of the decision in *Badham* v. *Mee* is confined to a particular part of the case, but his observations are general. "There appears to be no ground," he says, "for the doubt suggested as to the extinction of the power. If such a power cannot be exercised after the bankruptcy, the power of selection is gone, and

(*a*) 1 *Mylne & Keen*, 54.

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and in some cases the immediate limitation over, in default of appointment, may be to strangers. In *Badham* v. *Mee*, the knot was rather cut than untied, for the appointment was to the eldest son in fee, and the limitation, in default of appointment, was to him in tail, so that much mischief was not done by the decision in the particular case, however injurious it may be, as establishing a false principle (*a*)." Certainly a more false and injurious principle cannot be conceived, if indeed such a principle be established by *Badham* v. *Mee*, than that the assignee, who takes a bankrupt's estate, subject to a power of appointing under a marriage settlement among the children of the marriage, shall be entitled to say that the bankrupt cannot and ought not to execute such a power, but that he, the assignee, shall take the interest of the bankrupt's children, as well as the interest of the bankrupt.

If *Badham* v. *Mee* were precisely in point, and the ground of the decision in that case were not open to doubt, it would not conclude the question in the present case, because here the power is joint. Suppose there were four or five persons in whom a testator had vested a power of appointing among particular objects for their benefit, and not for the benefit of the donees, can it be contended that the bankruptcy of one of the donees who happened to have the ultimate reversion of the estate to be appointed would destroy the power? The question is whether, where there is a joint power of appointment by husband and wife under a marriage settlement among the children of the marriage, and the husband becomes bankrupt, the bargain and sale under the commission destroys the power. If it does not, this bill is improperly filed.

As

(*a*) *Sugd. Powers*, vol. i. p. 82. 6th edit.

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As to the second question, if the separate appointment by the surviving wife is good, the fact of its having been executed after the filing of the bill, cannot alter the merits, but can affect only the question of costs. If the execution of the bankrupt was, as is contended, a mere nullity, there is authority for contending that her execution in his lifetime may well be considered as the separate appointment of the survivor; for, where a power is to be executed in a contingent event, it may be executed before the happening of the contingency: *Countess of Sutherland* v. *Northmore.* (*a*) In that view of the case there is an end to the objection that the limitation under the appointment would fail for want of a particular estate to support it.

But there is no foundation for the objection to the separate appointment made by the widow. The rule that a limitation, which can by possibility take effect as a contingent remainder, shall never take effect as a springing use applies only to estates created by original deeds, and not to cases of estates created under powers. It is said that the estate under the power may be taken as a remainder, and therefore that it can never take effect as a springing use. But why should the Court be called upon to take it is a remainder? In the event which has happened it cannot take effect as a remainder. Why is it to be set up as a remainder for the mere purpose of destroying it? and why not construe it as a springing use, and thereby effectuate the intention of the maker of the settlement? The intention clearly was that, if there were no joint appointment, the wife, if she survived the husband, should execute the power. It is of the essence of a power to take effect by way of shifting use. The execution of the

(*a*) 1 *Dick.* 56. 3 *Vin. Abr.* 417. And see *Sugd. Pow.* vol. i. p. 347. 6th edit.

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the power devests the estates limited in default of appointment, and, when the power is executed, it takes effect by way of springing use. All the cases in which the rule has been applied are cases of limitations in the original settlement; the fallacy lies, therefore, in applying the rule to two sets of limitations, which has never been applied to more than one. The reversion in fee is vested, subject to be devested by the appointment, and that reversion is itself a sufficient estate of freehold to support the execution of the power by the wife, so that, in reality, no particular life-estate in the wife is wanted to give effect to the contingent remainder. *Cunningham* v. *Moody* (*a*) *Doe dem. Willis* v. *Martin* (*b*). Even if there is any doubt as to the application of the rule of law, there is none as to the intention of the settlement, and, if the settlement is so framed as to fail in giving a particular estate to support the contingent remainder in favour of the children, this is plainly a mistake in the settlement, which a Court of equity will reform.

Mr. *Pemberton* in reply.

There is no suggestion on this record that the settlement has not been so framed as to correspond with the intention of the parties, nor is it any part of the relief prayed by this bill, that the Court will reform the settlement. The question, therefore, is not what was the intention of the parties to the settlement, but in whom, according to the limitations of the settlement, the legal estate, subject to the term for securing the jointure, is now vested. Both parties having declined to take a case at law, this is the only question which the Court is now called upon to decide. As to the invalidity of the appointment in which the bankrupt joined, that point has been settled, after a solemn argument, by the case of

(*a*) 1 *Ves.* sen. 174. (*b*) 4 *T. R.* 39.

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of *Badham* v. *Mee*, from which it is impossible to distinguish the present case, unless an appointment by two persons, of whom one is disqualified, can be valid as a joint appointment. The principle upon which *Badham* v. *Mee* was decided was perfectly sound, for where a party has an interest coupled with a power, and departs with his interest, is it reasonable that he should be permitted to exercise the power in derogation of the interest which he has departed with? It is not denied that the execution of this power was to affect the estate of the assignees; its object was to take from the assignees that which, but for the execution of the power, was their absolute property. It has been decided, that where the interest is gone, a power appendant to it cannot be executed so as to affect the party benefiting by the loss of the interest, and many titles depending upon that decision would be shaken, if the principle established by it could be unsettled.

The first point, therefore, is really open to no doubt; but assuming the joint appointment to be bad, the question whether the separate appointment can operate by way of springing use so as to devest the estate, vested in the assignees by the bankruptcy, is one of greater nicety. If the estate limited to the children was a contingent remainder, upon the death of the husband it was destroyed, and the ultimate remainder in fee vested in the assignees of the bankrupt. The question is, whether, according to the limitations of the settlement, the estate so vested can be devested by the subsequent execution of the power by the wife; and that question depends upon another — whether, under the limitations of the settlement, the estate limited to the children could take effect as a contingent remainder; for, if it could, it can never take effect by way of springing use. Intention has nothing to do with this question; it depends entirely upon a rule of tenure.

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The intention always is that a limitation of this kind shall take effect as a springing use, but, wherever the rule is applicable, the intention is defeated. Thus in the case of a limitation of freehold estate to the use of *A* for his life, and after the death of *A* and *B*, to the use of *C*; the intention is, that *C* shall take at the death of the survivor of *A* and *B*, but that intention is defeated, if *B* survive *A*. It could then only take effect as a springing use, and as it might, in the event of *A* surviving *B*, have taken effect as a remainder, it can never take effect by way of springing use. Every appointment under a power, if it can take effect at all, takes effect exactly in the same way as if it were inserted among the limitations in the deed creating the power; the effect is the same as if the appointor wrote his limitations in the original instrument. Applying this undisputed principle to the present case, it is evident that, as the power has been executed by the wife, a limitation to the two children four years after the determination of the particular estate could only take effect by way of springing use. But the estate limited to the children in the original settlement under the power to the survivor of the husband and wife might have taken effect as a contingent remainder, and therefore it cannot take effect as a springing use. Generally the rule is that, if there is a particular estate of freehold, and the subsequent limitation can by any possibility take effect on the determination of that particular estate, it can take effect in no other event. Rules of tenure are enforced with the same inflexible strictness in other instances as well as in that of contingent remainders. Thus the rule against perpetuities allows the vesting of an indefeasible estate to be postponed only for the period of any life or lives in being, and twenty-one years afterwards. Now, a limitation to an unborn son of *A* to vest at the age of twenty-one years and a day would only violate the rule in the event of *A* surviving all

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all other individuals in the world, living at the time of the limitation; yet this very remote possibility determines the application of the rule, and such a limitation is wholly invalid.

Aug. 5.

The MASTER *of the* ROLLS.

The Plaintiffs in this cause claim to be entitled to the estate in question, under the will of *Clement Poole*, who contracted to purchase the same from the assignees of *Hugh Escott*, a bankrupt, and under a conveyance from the same assignees.

The Defendants, *John Escott* and *Jane Elizabeth Escott*, claim to be entitled to the same estate under a joint appointment thereof, executed by *Hugh Escott* and *Margaret* his wife, and under a separate appointment thereof executed by the same *Margaret Escott* after the death of her husband.

On the marriage of *Hugh Escott* and *Margaret* his wife, an indenture, dated the 8th of *October* 1804, and made between *Hugh Escott* of the first part; *Margaret Dods*, afterwards his wife, of the second part; *James Newton* and *William Leigh*, of the third part; and *Thomas Escott* and *George Henry Leigh*, of the fourth part, was executed.

(His Lordship stated the limitations of the marriage settlement.)

This deed, having limited a life estate to *Hugh Escott*, but no life estate to the wife, and having limited the estate to the sons and daughters, and their children who should be living at the death of the survivor of the husband

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band and wife, it appears that, if the husband survived the wife, and in default of appointment, the estates limited to the sons and daughters and their children living at the death of the survivor would take effect by way of remainder, but that, if the wife survived the husband, there would be no particular estate to support the contingent uses for the children living at the death of the survivor.

No appointment was executed in or before the year 1825, when *Hugh Escott* became bankrupt. His assignees put up his interest to sale. His interest was a life estate and the ultimate reversion, subject to the annuity secured to the wife if she survived him, and subject, as the Plaintiffs admit, to the contingent estates limited to the children living at his death if he survived his wife. And the Defendants contend that his ultimate reversion was also subject to the power of appointment created by the settlement.

Some time after the bankruptcy, and on the 25th of *May* 1831, *Hugh Escott* and his wife executed a deed, which purported to be a joint appointment made by them to their children, *John* and *Jane Elizabeth Escott*.

In *March* 1834, *Hugh Escott* died, leaving his wife surviving him; and upon his death, *John* and *Jane Elizabeth Escott* claimed to be entitled as appointees, and having obtained possession, which the Plaintiffs could not recover at law by reason of the 2000 years' term, the present bill was filed.

After the filing of the bill, the surviving wife executed a deed, purporting to be an appointment to the same effect as that which was executed by her and her husband in his life time.

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The Plaintiffs allege that, upon the death of the husband in the life time of the wife, the particular estate determined, and the contingent limitation to the children failed; and further, that the bankruptcy of the husband destroyed the joint power, and that the separate power had really no existence, because the estate to be thereby appointed could not take effect at the moment when the particular estate determined.

The Defendants allege that the assignees took the estate subject to the powers of appointment, which, as they say, were effectually exercised.

The question in the cause depends, first, on the construction of the settlement; and secondly, upon the effect of the bankruptcy and the assignment under the bankruptcy upon the power of appointment.

By the settlement the estate was limited to *Hugh Escott* for life; and, after providing a jointure for the wife, a power was given to the husband and wife or the survivor of them, to appoint to the children of the marriage, and in default of appointment, the estate was limited to such sons and daughters, or such children of deceased sons and daughters of the marriage as should be living at the death of the survivor of the husband and wife, with an ultimate remainder to the husband in fee.

The husband had an estate for life, and, if he had survived the wife, the settlement was so framed as to give effect to what may reasonably be supposed to have been the intention of making provision for the children on his death. Upon the determination of the life estate, the children, either those designated by an appointment, or those described by the deed, would have immediately succeeded. They would have taken by way of remainder,

mainder, and as in this event they would have taken by way of remainder, the deed is not to be so construed as to give estates by way of springing use; and, as the wife survived the husband, and had no life estate limited to her, the limitation to the children living at the death of the survivor of the husband and wife failed, and no appointment to be made by the wife alone could be valid.

If there had been no bankruptcy, the joint appointment of the husband and wife would have taken effect; and considering that the contingent remainder limited to the children failed in consequence of the determination of the particular estate before the limitation to the children took effect, the only question is, whether the joint power of appointment continued after the bankruptcy and the assignment to the assignees.

The appointment could only take effect out of the ultimate remainder in fee vested in the husband, and, if the power had been to be exercised by the husband alone, I am of opinion that, upon the authority of *Badham* v. *Mee*, it would have been extinguished; and the question is therefore reduced to this, whether the husband, who could not exercise a separate power, could exercise a joint power of appointment vested in him and his wife.

The estate for life in the husband, and the ultimate remainder in fee were vested in the assignees by act of law, in this respect equivalent to a conveyance. If there had been a conveyance, the husband could not have derogated from his grant; and I am of opinion, that he could not, by joining his wife, defeat the effect of the act of law to which his estate had become subject; and it appears to me, that his disqualification made it impossible that the joint power should be exercised.

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BETWEEN

May 5.
June 16.

The Governor and Company of the Bank of ENGLAND, - - - - Plaintiffs;

AND

Sir FELIX BOOTH, Bart., WILLIAM MILLER CHRISTY, WILLIAM CURLING, JOHN PETER DARTHEZ, Jun., GEORGE HOLGATE FOSTER, WILLIAM ORMSBY GORE, WILLIAM HUGHES HUGHES, JOHN CHRISTOPHER LOCKNER, WILLIAM MITCALFE, AMBROSE MOORE, JOHN M'TAGGART, Sir FRANCIS PALGRAVE, THOMAS PHILLPOTS, JOSHUA SCHOLEFIELD, GEORGE SCHOLEFIELD, WILLIAM SHADBOLT, THOMAS STOOKS, GEORGE TAYLOR, WILLIAM VENABLES, and GEORGE POLLARD, - Defendants.

A bank at *Kingston*, in *Upper Canada*, drew a bill payable at sixty days after sight, directed to *G. P.*, manager, Joint Stock Bank, *London*, which was accepted by *G. P.*, who was the manager of the *London* Joint Stock Bank, but not a shareholder or partner in that concern, in these words: "Accepted at the *London* Joint Stock Bank. *George Pollard.*" By an arrangement between the *London* Joint Stock Bank and the *Canada* Bank, the *London* Joint Stock Bank guaranteed the payment at maturity of all bills of exchange so drawn by the *Canada* Bank to the extent of 40,000*l.*

THE bill, after stating the substance of the several acts relating to the Bank, proceeded to state that in the year 1836, certain persons associated themselves together for the purpose of establishing a banking establishment in *London*, under the style or firm of the *London* Joint Stock Bank, and that they issued a prospectus to the following effect. "The *London* Joint Stock

Held, that this transaction was a violation of the exclusive privileges of the Bank of *England* within the 3 & 4 *W.* 4. *c.* 98., and the other acts relating to the Bank. And an injunction was granted accordingly against the *London* Joint Stock Bank, *G. P.*, and their agents.

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Stock Bank, *Princes Street*, *Mansion House*. Capital three millions in 6000 shares of 50*l*. each. Director Sir *Felix Booth*, &c., *George Pollard*, Esq., Manager. The business of the bank is conducted on the following principles. Accounts of parties properly introduced, are received agreeably to the present custom of *London* bankers, with this advantage, that interest is allowed on correct accounts, and on deposits, on the first day of every month, at the rate of 2*l*. per cent. on the smallest balance which may appear to the credit of each account at the close of any days during the preceding month. Sums of money received on deposit at such rate of interest, and for such periods as may be agreed upon, reference being had to the state of the money market, and, if required, bills or promissory notes at not less than six months' date, will be delivered to the depositors in lieu of receipts for sums not less than 100*l*. Interest at the rate of 2*l*. 10*s*. per cent, allowed on sums not exceeding 2000*l*. deposited without special agreement, which may be withdrawn at any time on giving ten days' notice. The agency of joint-stock, and other country and foreign banks undertaken on such terms as may be agreed upon. Investment in and sales of all descriptions of *British* and foreign securities, bullion, specie, &c. effected; dividends received and every other description of banking business and money agency transacted. A bill committee of the directors sit daily from 12 to 2 o'clock to receive applications for discounts, which are considered confidential, and promptly decided upon. The Board of Directors meet weekly, when a full statement of the affairs of the bank is laid before them." That such company or partnership was in fact established in the month of *October* 1836, and that the Defendants were the directors and managers of the said company, and were all partners or shareholders in the same.

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The bill then alleged, that the Plaintiffs had discovered that the object and design of the said company was not only to carry on the business of a bank of deposit, but to borrow, owe, and take up money on their bills or notes at a shorter date than six months from the issuing thereof in violation of the privileges of the Plaintiffs.

That a banking establishment carrying on business at *Kingston*, *Upper Canada*, in *North America*, under the style of "*The Commercial Bank*, *Midland District*," had previously to the month of *May* 1837, commenced drawing, and had in fact drawn divers bills of exchange, payable at less time than six months from the time of acceptance, upon the *London* Joint Stock Bank, and that such bills of exchange had been accepted by the last mentioned company; and that such bills had been drawn and negotiated with a view to maintain a circulation of paper money for the benefit of the *London* Joint Stock Bank.

That on the 26th of *April* 1837, the secretary of the *London* Joint Stock Bank addressed the following letter to the Plaintiffs: "Gentlemen, having received from a transatlantic bank the offer of their agency, which would involve the necessity of the bank accepting their drafts, payable at shorter date than six months, the directors of this bank are desirous of knowing whether the directors of the Bank of *England* would interpose any difficulty in the way of the bank accepting such drafts. — I have the honour, &c."

That the Plaintiffs caused a letter to be written by their secretary in reply, as follows: — "Bank of *England*, 27th of *April* 1837. Sir, I am desired to acknowledge the receipt of your letter of the 26th inst., addressed to the

the Governor and Court of Directors of the Bank of *England*, in which you asked whether the Directors of the Bank of *England* would interpose any difficulty in the way of the *London* Joint Stock Bank accepting drafts payable at a shorter date than six months; and in reply I have to state, that such acceptances would be an infringement of the privileges of the Bank of *England;* and, as respects the public, would be illegal and void, and, consequently, could not be permitted by this corporation. — I have the honour, &c."

That, notwithstanding such reply, at the end of *September*, 1837, the Plaintiffs received, among various bills of exchange which formed part of remittances sent to them from *Canada*, a bill of exchange, drawn by the president of the Commercial Bank, Midland district, upon the *London* Joint Stock Bank, as follows: —

"£1000 sterling. *Kingston, Upper Canada*, 25th of *July*, 1837. Sixty days after sight, pay this my first of exchange, second and third unpaid, to the order of *F. A. Harper*, cashier, the sum of 1000*l.* sterling, value received, which place to the account of the Commercial Bank, Midland district, with or without further advice. *John S. Cartwright*, president, to *George Pollard*, Esq., manager, *London* Joint Stock Bank, *London*."

The bill proceeded to state that the Plaintiffs, on the 2nd of *October*, 1837, presented the said bill of exchange for acceptance at the office of the *London* Joint Stock Bank, and that the same was accepted by *George Pollard*, as manager of the said bank, as follows: — "Accepted, 2d *October*, 1837, at the *London* Joint Stock Bank. *George Pollard*."

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The bill alleged that the word "at" was fraudulently introduced for the purpose of defrauding the Plaintiffs and the public; and that the said bill of exchange was really accepted by the *London* Joint Stock Bank, and that such company held themselves and their assets liable to pay the same; and it stated that the Plaintiffs caused the bill of exchange again to be taken to the office of the *London* Joint Stock Bank, and required an acceptance in words according to the tenor of the bill; but that one of the clerks stated that such acceptance was sufficient, and that the bank were ready to discount the bill.

That, on the 26th of *October*, 1837, the Plaintiffs caused their solicitors to write the following letter to the Defendants: — "Gentlemen. — The attention of the Governor and Directors of the Bank of *England* has been drawn to bills of exchange which have recently appeared, drawn by a bank in *Upper Canada*, for which it appears you act as *London* agents, upon your manager, and accepted at your office. The Bank are advised that the acceptance of such bills, having less than six months to run, is a violation of their exclusive privilege; and we are therefore requested to know whether it is intended to persist in the practice, as in that case we are instructed to take immediate proceedings to obtain an injunction from a court of equity.

That the Defendants wrote a letter in answer as follows: — "*London* Joint Stock Bank, 2d *November*, 1837. Gentlemen. — Your letter of the 26th ult., addressed to the directors of this bank, was laid before the Board yesterday; and, in reply thereto, I am instructed to state that the directors deny that any practice has been adopted by the *London* Joint Stock Bank which is a violation of the exclusive privilege of the Bank of *England*, the *London* Joint Stock Bank never having accepted,

cepted, nor directed, nor authorised their manager, or any other person, to accept any bills of exchange having less than six months to run."

The bill, among other charges, charged that the directors had authorised *George Pollard* to accept bills of exchange drawn upon the company in the manner and form in which the bill of exchange, dated the 25th of *July*, 1837, had been accepted by *Pollard*.

It charged that the said form of acceptance had been resorted to in consequence of the acts of parliament giving such privilege as aforesaid to the Plaintiffs, and with intent and for the purpose of evading or eluding the provisions of the said acts or some of them, or of avoiding the operation thereof.

The bill further charged that the Defendant *George Pollard* had no connection with the Commercial Bank, *Upper Canada*, except as agent, manager, or servant of the *London* Joint Stock Bank; that the bills of exchange so accepted by *George Pollard* were entered in the bill books belonging to the company, and paid out of the money belonging to the bank. And it prayed that an account might be taken of all bills of exchange and promissory notes accepted or caused to be accepted by the Defendants for or on behalf of the company, payable at a less time than six months from the acceptance thereof; and particularly of all bills of exchange and promissory notes drawn upon the company, accepted by the Defendant *Pollard* or any agent of the company, in the form in which the bill of exchange, dated the 25th of *July*, 1837, was accepted, and of the gains and profits of the company made by such acceptances; and that it might be declared that the accepting such bill of exchange, dated the 25th of *July*, was a fraud upon the

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Plaintiffs; and that the Defendants might be restrained from accepting or causing to be accepted, for or on behalf of the *London* Joint Stock Bank Company, any bill of exchange or promissory note, payable at less than six months from the acceptance thereof; and from accepting or causing to be accepted, by the Defendant *George Pollard*, or any agent of theirs, in the form in which the bill, dated the 25th of *July*, 1837, was accepted, any such bill of exchange or promissory note; and that the Defendant *George Pollard*, and every agent or servant of the company, might in like manner be restrained, and that all the Defendants might in like manner be restrained, from in any other manner borrowing, owing, or taking up, in *England*, for and on behalf of the said company, any sum or sums of money on the bills or notes of the said company, payable on demand, or at any less time than six months from the borrowing thereof.

The Defendants, the directors of the *London* Joint Stock Bank, filed a joint and several answer; and a separate answer was filed by the Defendant *George Pollard*, the manager, who was not a partner or shareholder. By these answers it appeared that, 30,000 shares having been subscribed for by the 22d of *October*, 1837, the bank, by a second prospectus, announced its intention of commencing business; and that on the 31st of *October*, 1837, was executed a partnership deed between certain of the directors of the first part, trustees of the second part, and the persons whose names and seals were or should be subscribed to the deed, of the third part, by which it was provided that the concerns of the company should be under the control of nineteen directors, who should have the entire management of the business of the company, and the sole power of appointing and removing the manager and every other officer or servant of the company; that such person or persons

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persons as the directors should by any resolution or minute authorise should exclusively have power to sign, draw, indorse, and accept all bills of exchange and promissory notes, and other negotiable securities; and that no bill, note, &c., signed, drawn, indorsed or accepted in any other manner should be binding upon the company; and each of the directors and shareholders thereby disclaimed all right to sign, accept, or indorse, any bill, &c., or to contract any engagement so as to bind or charge the company, unless he should be expressly authorised so to do by the Board of Directors. By another clause the directors were to have the entire control and disposition of the capital and effects of the company, and the manager and other officers of the company were in every respect to abide by their orders and regulations. The fortieth clause authorised the directors to execute any power of attorney, to enable any other person or persons to act on behalf of the company, in any transaction, business, or thing, which should be stated in such power.

At a Board of Directors held on the 19th of *November* 1836, a resolution was passed, authorising *George Pollard*, the manager of the bank, exclusively to indorse all such bills of exchange and promissory notes, and to draw such cheques in the name and on account of the company as might be necessary in the usual course of business. On the 14th of *March* 1837, the *London* Joint Stock Bank received a letter from *Harper*, the secretary of the *Kingston* Commercial Bank, in *Upper Canada*, proposing that the *London* bank should become their agents, receiving drafts from the *Canada* bank payable at sixty days, and giving the *Canada* bank a credit for that time to the amount of from 40,000*l.* to 60,000*l.* After the answer of the Bank, stated in the bill, to the letter of the secretary of the *London*

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Joint Stock Bank; and on the 6th of *May* 1837 it was resolved, at a meeting of the directors of the *London* Joint Stock Bank, that a communication should be made to the *Kingston* Commercial Bank, stating their readiness to act as the agents of the *Kingston* Commercial Bank, upon condition that all drafts should be drawn upon and accepted by the manager of the *London* bank in his individual capacity. On the same day *Pollard* wrote a letter to *Harper*, stating that, by the construction put upon the charter of the Bank of *England* by the Court of Common Pleas and the Master of the Rolls, no joint-stock bank could accept bills of exchange in *London*, or within sixty-five miles of *London*, at a less date than six months; and suggesting that the difficulty might be got over, either by the *Kingston* Commercial Bank issuing their own promissory notes to the extent of 40,000*l.*, payable at sixty days at the *London* Joint Stock Bank; or by drawing, at sixty days' sight, bills upon *George Pollard*, the manager of the *London* Joint Stock Bank, the due payment of the bills accepted by the manager to be guaranteed by the *London* Joint Stock Bank. In answer to this communication, *Harper* wrote a letter, dated the 21st of *June* 1837, stating that the Board of the *Kingston* Commercial Bank had taken into consideration the two modes proposed, so as not to come within the power of the acts in favour of the Bank of *England*, and preferred that of drawing on the manager at sixty days; and requesting that the guarantee of the *London* bank might be sent to protect the drafts of the president of the *Kingston* Commercial Bank. This letter was submitted to a Board of Directors held on the 26th of *July* 1837, at which it was resolved that the agency of the *Kingston* Commercial Bank should be accepted on the terms proposed; and that a letter, signed by the trustees, should be addressed to that bank, undertaking that, in consideration of the *Kingston* Commercial

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Commercial Bank keeping a banking account with the *London* Joint Stock Bank, the *London* bank would provide the necessary funds to pay at maturity all such bills as might be drawn by the *Kingston* bank upon and accepted by Mr. *George Pollard*, manager of the *London* bank, such bills being accepted by him in his individual capacity. This guarantee was sent by the secretary of the *London* Joint Stock Bank to the *Kingston* Commercial Bank, on the 29th of *July* 1837, together with a counter-undertaking to be executed by the *Kingston* bank, that they would pay the balances due to the *London* bank, which was afterwards executed accordingly by the *Kingston* Bank, and returned to the *London* bank. The president of the *Kingston* Commercial Bank drew the bill of exchange, dated the 5th of *July* 1837, in anticipation of the guarantee being sent out. This bill was protested by the Bank of *England* for non-acceptance, but the Bank afterwards received the amount upon discount. On the 6th of *October* 1837 the Defendant *Pollard* wrote to *Harper*, suggesting a further alteration in the form of the bills of exchange, by leaving out the word "manager," and directing them to *George Pollard*, Esq., at the *London* Joint Stock Bank.

The Defendants, the directors, denied, by their answer, that the bill was accepted by the Defendant *Pollard*, as manager of the company, on their behalf and for their benefit, but said that it was accepted on behalf of himself, and for the benefit of the *Kingston* Commercial Bank; they denied that the word "at" was fraudulently inserted; and they further denied that they held themselves or the assets of the company responsible or liable to pay the said bill of exchange; but they stated the arrangement made between the *London* Joint Stock Bank and the *Kingston* Commercial Bank; and they

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said that, in conformity with such arrangement, they had, out of monies belonging to the *Kingston* Commercial Bank in their possession, or out of their own monies, from time to time, paid all the bills of exchange of the *Kingston* Commercial Bank drawn upon and accepted by the Defendant *Pollard*, which bills were sometimes addressed to *G. Pollard*, Esq., Manager, *London* Joint Stock Bank, *London;* and at other times, to *G. Pollard*, Esq., Manager of the *London* Joint Stock Bank, *London;* and at first "accepted (date) *at* the *London* Joint Stock Bank, *Geo. Pollard;*" and, subsequently, "accepted (date) payable at the *London* Joint Stock Bank. *Geo. Pollard.*" The Defendant *Pollard* admitted that he carried on no business of his own, and that he had no other occupation, except that of manager of the *London* Joint Stock Bank; and that the only connection which he had with the *Kingston* Commercial Bank, in his individual character, was in accepting their bills of exchange; and that the bills accepted by him were paid out of the assets of the company; but he said that he had authority to indorse bills and draw cheques, but no authority to accept bills of exchange on behalf of the company; that the bills of exchange accepted by him were entered in a private account kept by himself, and, when paid, were entered in the books of the company.

A motion was now made, on the part of the Plaintiffs, for an injunction in the terms prayed by the bill.

Mr. *Pemberton*, Mr. *Maule*, and Mr. *Griffith Richards*, in support of the motion.

The directors of the *London* Joint Stock Bank, who have given a guarantee for the payment of the bills drawn by the *Kingston* Commercial Bank upon their manager, have nevertheless thought fit to deny that their assets are liable

liable for such payment. They say, indeed, that they have paid, and intend to pay such bills, but they deny their liability, because they are drawn upon *George Pollard* in his individual capacity. The guarantee, given by the company to the drawers, that these bills shall be paid by the company, amounts to such an engagement to pay as would probably render them liable in an action at law. This being a foreign bill of exchange, a written acceptance is not necessary; but any act, which shows an intention on the part of the company to pay the bill, amounts to an acceptance; *Fairlee* v. *Herring*. (*a*) Supposing, however, that they are not liable at law, this is an attempt to evade the provisions of the 3 & 4 *W.* 4. *c.* 98., and the other acts of parliament by which banking copartnerships, consisting of more than six persons, within sixty-five miles of *London*, are prohibited from accepting bills of exchange payable at less than six months from the time of acceptance. In the *Bank of England* v. *Anderson* (*b*), the Court of Common Pleas, upon a case sent by this Court, was of opinion that the accepting such a bill of exchange was within the prohibitory clause in the Bank Acts; their certificate was confirmed, after an elaborate argument, by this Court, and though an appeal to the House of Lords was commenced by the defendants, it was subsequently abandoned; and the question may, therefore, be considered as finally determined. That the Defendants contemplated an act which they knew to be a violation of the privileges of the Bank is clear, from their having applied to the Bank for permission to do it. That permission was refused, and they have attempted, by an evasion of the act, to accomplish the very same thing which the act has prohibited. Such an evasion of an act of parliament a court of equity will not permit. The whole spirit of the decision of this Court was to give a substantial,

(*a*) 3 *Bingh.* 625. (*b*) *suprà*, p. 328.

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substantial, and not a merely formal, protection to the Bank; and, if the substance of the thing prohibited has been done, the form in which it has been done is immaterial. The company provides funds for the payment of the bills accepted by *Pollard;* they are, for all substantial purposes, the acceptors; being acceptors, they come within the prohibitory clause of the Bank Acts, and this Court will not suffer the privileges, which the legislature has given to the Bank, to be defeated by the shallow pretence that *Pollard* has accepted the bills in his individual capacity, or by the ingenious substitution of the word "at" for "for;" a contrivance closely resembling the artifices which are sometimes resorted to by vendors of spurious merchandise, but which ought not to have been imitated by a respectable banking establishment.

Sir *William Follett*, Mr. *Kindersley*, Mr. *Willcock*, and Mr. *Duckworth*, *contrà*.

The privileges intended by the legislature to be given to the Bank of *England* are in no way affected by the transaction which this motion seeks to restrain. The present application is not made for the purpose of protecting the Bank of *England;* but it is made from totally different motives. The sole question is, whether this transaction is or is not a violation of the acts relating to the Bank, and in particular of the last act, 4 & 5 *W.* 4. *c.* 98. Whether it be a direct infringement of the act or a fraudulent evasion of it is immaterial, for in either case a court of law may deal with it, or a court of equity may, if it thinks fit, interfere by injunction. But if by evasion is to be understood the avoiding the provisions of an act of parliament, so as not to come within their scope, this is a proceeding which a court of equity has no more power than a court of law to prevent. If the Plaintiffs have no remedy at law, because the provisions of

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of the act have not been violated, though they may have been avoided, or, as they say, evaded, neither can they have any remedy in this Court, which has no power to extend the provisions of an act of parliament. It is the office of a court of equity to soften the asperities of the law — not to add to its prohibitions and aggravate its severity; and this is, perhaps, the first instance in which a court of equity has been called upon to extend the penal provisions of an act of parliament. If the transaction be a borrowing, owing, or taking up of money, within the meaning of the Bank Acts, this Court will interpose; but there has been no infringement of those acts. This injunction cannot be granted unless the Defendants have been guilty of an indictable offence; for, if the act of parliament has been violated, the Defendants are liable to an indictment. It is said that this is an attempt, on the part of the Defendants, to evade the act of parliament. Their object undoubtedly is so to conduct their business as to avoid the violation of the act of parliament, if they can; and, if to do that, be to evade the act, it may be admitted that this is an attempt at evasion. The exclusive privileges of the Bank were continued in acts of parliament from the 6th of *Anne* down to the 7 *Geo.* 4. *c.* 46., which act for the first time enabled banks to be established by more than six persons. That act did not extend to *London*, or to places within sixty-five miles of *London*. By the 3 & 4 *W.* 4. *c.* 98. the liberty of carrying on the business of banking is extended, upon certain conditions, to partnerships consisting of more than six persons in *London*, or within any distance from *London*. These conditions impose great inconveniences upon banking establishments. The *London* joint stock banks cannot sue and be sued in the name of one of their officers, for that, it is said, would be an infringement of the privileges of the Bank. It has been decided that

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that they cannot accept a bill of exchange drawn for a less time than six months, for that would be an infringement of the privileges of the Bank; but those privileges ought not to be stretched to an extent which the language of the acts of parliament does not warrant.

Whether a foreign bill of exchange is within the prohibition is still a question. It is clear that a foreign bill of exchange, drawn by a foreign bank upon a *London* bank (which has money of the foreign bank in its hands), for the purpose of enabling it to negociate its paper in this country, can never come into competition with the circulating paper of the Bank of *England;* and the fair inference, therefore, is that it does not fall within the meaning of the prohibitory clause in the acts of parliament. The Bank has the power, and, if the power, it has shewn that it has the will and the inclination, to throw every obstacle in the way of joint stock banks, and to prevent them, if possible, from carrying on their business. It can prevent them from suing and being sued by an officer of their own; it can prevent them from accepting a bill of exchange payable at less than six months; and in this prohibition foreign bills of exchange, though the point is undecided, may, perhaps, be included. There is no mode in which, so long as the privileges of the Bank continue, they can conduct their business upon an equality with that corporation; but if they can find a mode by which they may avoid some of the inconveniences to which they are exposed without violating the acts of parliament, they have a clear right to avail themselves of it. It is not denied, but avowed, that their object is to get out of the provisions of the act of parliament if they can; and they have a right to do so. It could not be the intention of the legislature, when it enabled joint stock banks to be established in *London*, that the privileges of the Bank should be so construed

construed as to render it impossible for such joint stock banks to carry on their business. It cannot be disputed that the *London* Joint Stock Bank had a right to act as agents of the *Canada* bank, to make advances for that bank, and to pay its paper to any amount which they thought fit to answer.

Suppose the *Canada* bank had made their promissory notes payable by the *London* Joint Stock Bank, that might be done without any infringement of the act of parliament; and it is, in fact, the course which has been adopted by the country banks. Suppose the bills of the *Canada* bank, instead of being drawn on Mr. *Pollard*, as manager of the *London* Joint Stock Bank, had been drawn upon a merchant resident in the City of *London*, who thought fit to accept them upon a guarantee from the *London* Joint Stock Bank, would that have been an infringement of the act of parliament? A fraudulent evasion of an act of parliament is an infringement of the act, and will be dealt with accordingly by a court of law or equity. But a contrivance to avoid the inconveniences to which a class of men are exposed by the penal provisions of an act of parliament is not unlawful, and cannot be restrained by a court of equity, because a court of equity cannot extend the provisions of an act of parliament.

This joint stock company is instituted under the provisions of the 3 & 4 *W.* 4. *c.* 98. *Pollard*, the manager, is not a partner or shareholder; the deed, under which the company is established, provides that no notes shall be accepted or drawn except by the authority of the directors; and, by a resolution passed at a meeting of the directors, authority was given to *Pollard*, not to draw or accept any bills, but only to indorse

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indorse bills, and draw cheques. A joint stock company is not liable upon bills of exchange unless it has given authority to the drawer or acceptor. Here the bill is drawn by the *Canada* bank upon *Pollard*, who has received no authority from the *London* Joint Stock Company to accept it. The question is, whether the *London* Joint Stock Bank is liable upon this bill of exchange; if they are not, the Court cannot grant the injunction sought by the Plaintiffs. In this case it cannot be said that there is an owing or borrowing on the part of the *London* bank, so as to bring them within the prohibitory clause of the Bank Acts; for the terms of the agreement are, that they actually make advances to the *Canada* bank to the extent of 40,000*l.* beyond the assets they have in their hands: they neither accept, owe, nor borrow. As to the effect of the guarantee, that is another question; the guarantee of the trustees is, that the funds of the *London* Joint Stock Bank shall be responsible, not the *London* Joint Stock Bank itself.

The conduct of the Bank in this transaction is open to much animadversion. They first call upon the Defendants so to alter the bill as to bring it within the prohibitory clause; and when they fail in that, though they well knew that the bill would be honoured, they protest it for non-acceptance; and, when the *London* bank offered to discount it, they at first refuse unless the expense of the protest is paid: when that is refused by the *London* bank, they are content to pay the expense of the protest themselves; and, finally, though they had received payment of the bill, and abandoned the unjustifiable claim to the expense of the protest, they sent out notice of the protest to *Canada* for the sole purpose of shaking the credit of the *London* Joint Stock Bank.

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Unless the holder of the bill stands in the same situation as if the *London* Joint Stock Bank had accepted it, the foundation upon which the present motion rests entirely fails. Now, if the *London* Joint Stock Bank were to refuse payment of the bill, the holder would have no remedy against them, nor even against the trustees; *Pollard* individually, or the *Canada* bank, would be alone liable. It is said, indeed, that the *London* Joint Stock Bank may be sued upon this bill, but not a single authority can be cited in support of that proposition. No person can be liable on a bill of exchange, unless he be a party named on the bill — unless he be the drawer, acceptor, or indorser. In *Thomas* v. *Bishop* (*a*), the defendant, who accepted, generally, a bill of exchange directed to him as cashier of the *York* Building Company, and not as servant of the company, was held to be liable in an action brought against him by the indorsee. In *Leadbitter* v. *Farrow* (*b*), the agent of a country bank was held to be liable upon a bill drawn by him in his own name upon a firm in *London*, which was the same firm as the country bank, though the payee knew that the drawer was the agent of the country bank, and acted in that character. Lord *Ellenborough* in giving judgment says, "Is it not the universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another?" So, where one of several parties draws a bill of exchange in his own name, and the proceeds are applied to partnership purposes, the partnership is not liable in an action upon the bill. *Emly* v. *Lye* (*c*), *Denton* v. *Rodie*. (*d*) In *Jackson* v. *Hudson* (*e*), the bill was

(*a*) 2 *Str.* 955.
(*b*) 5 *M. & S.* 345.
(*c*) 15 *East*, 7.
(*d*) 3 *Campb.* 493.
(*e*) 2 *Campb.* 447.

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was accepted by the drawee, and also by another person for the purpose of guaranteeing his credit, and the drawee was held to be solely liable as acceptor. It is true that a firm may carry on business in the name of an individual partner, and then the firm will be bound by his acts. *South Carolina Bank* v. *Case* (*a*), *Ducarrey* v. *Gill* (*b*); but in this case it is not alleged that the *London* Joint Stock Bank carried on their business under the firm of *George Pollard*. There may also be an implied authority to draw bills in the name of a partnership firm, which shall exonerate the drawer from personal liability; as where the survivor of three partners employed the defendant to wind up the concerns of the partnership, and the defendant, using the name of the firm, drew a bill of exchange upon a debtor to the firm, which the debtor accepted; and it was held that he was not liable upon the bill, without proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*. *Wilson* v. *Barthrop*. (*c*) But there is a distinction between joint stock companies and other partnerships; for it has been held, in the last case which has been decided on this subject, that there is no implied authority in a member of a joint stock company to accept bills of exchange on the part of the directors and of the company. *Bramah* v. *Roberts*. (*d*) If there is a doubt whether the *London* Joint Stock Bank can be sued or not upon the acceptance of *Pollard*, this is a proper case for a court of law, and the Court ought not to interfere by injunction.

Mr. *Pemberton*, in reply.

It has been decided that the exclusive privilege of the Bank is violated, if any banking establishment, consisting

(*a*) 8 *B. & C.* 427.
(*b*) *Mo. & Ma.* 450.
(*c*) 2 *Mees. & Wels.* 863.
(*d*) 3 *Bing. N. C.* 963.

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sisting of more than six persons, become liable upon a bill of exchange payable at less than six months, whether by drawing, indorsing, or accepting it. It is admitted that the *London* Joint Stock Bank cannot directly infringe the act by accepting a bill of exchange; and the question is, whether a court of equity will permit them to do that covertly and fraudulently, which they cannot do directly. It is argued that, unless they can be convicted of an indictable offence, they have a right to evade the provisions of the act, as if the principle, which screens a smuggler under a penal act, were applicable to a case in which the Court is called upon to interfere for the protection of private rights. The acts giving protection to the Bank of *England* are not penal acts; but they are acts passed for giving effect to a contract between the Bank and the public, for which the Bank paid a large price to the government, and by the terms of which every individual subject of the kingdom is as much bound as if he had set to it his hand and seal. Every act which confers exclusive privileges upon the Bank is founded upon this contract, and is really in the nature of a private act, the Bank being as much entitled to the benefits reserved in its favour, as if it were a party to a conveyance containing covenants to the same effect. The very titles of the acts shew this: the 39 & 40 *G.* 3. *c.* 28. is intituled An Act for establishing an agreement with the Governor and Company of the Bank of *England*, &c. There is a clause declaring that it shall be taken to be a public act, which shews that it is in the nature of a private act. The 7 *G.* 4. *c.* 46., which enables banking co-partnerships consisting of more than six persons to carry on business at a certain distance from the metropolis, recognises in the Bank the right of exclusive banking, and recites that the Governor and Company had consented to relinquish a portion of their privileges. The fifteenth section of that act, to

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remove any doubts that might arise as to the right of the Bank to carry on banking business in any part of *England*, as well by committees and agents as under the immediate direction of the Court of Directors, gives declaratory powers to the Bank for that purpose.

If the defence relied upon by the *London* Joint Stock Bank can prevail, there is an end to the exclusive privileges of the Bank, for promissory notes payable at sight may as well be issued by banking establishments as bills of exchange. The defence is that, if the letter of the act can be evaded, the Defendants have a right to set its spirit at defiance; but a court of equity will see that the spirit of the contract between the Bank and the public is maintained. Now *The Bank of England* v. *Anderson* has decided that, if the Defendants owe money upon the bills, whether they can be sued as drawers, acceptors, or indorsers of the bill or not, the owing is sufficient to bring them within the scope and meaning of the act. It is repugnant to common sense to say that this is not substantially a bill accepted by the *London* Joint Stock Bank through the medium of their servant or agent *Pollard*: they find the funds for paying it; they receive a commission upon the transaction, which is carried to the account of the company; their engagement to pay is not a guarantee, or secondary liability, but it is a primary and original liability. Even at law, therefore, if they refused to pay, the *Kingston* Commercial Bank might maintain an action against them upon this bill; and none of the authorities, which have been cited, shew the contrary. In *Thomas* v. *Bishop* the action was by an indorsee, a stranger to the circumstances of the transaction, against the defendant, the cashier of the company, who had accepted generally, and who had no right to charge it to the company till he had paid it himself. But the Court said it would have been otherwise, if the action had

nad been by the payee who was privy to the transaction, and he had tendered the bill as a bill upon the company. *Thomas* v. *Bishop*, therefore, is in reality an authority in favour of the Plaintiffs. The same principle is followed in the other cases. *Wilson* v. *Barthrop* shews that a firm may be bound though it does not appear *eo nomine* upon the bill. In *Bramah* v. *Roberts* it did not appear that the defendants had any authority to bind the company by their acceptance; here the *London* Joint Stock Bank was in effect trading under the firm of *George Pollard.*

But if the *London* Joint Stock Bank cannot be sued as acceptors upon the bill, it is clear that they owe money upon it; and, if they owe money upon it, they are within the prohibitory clause in the Bank Acts. To owe upon a bill is to be liable for the payment of it, and it is impossible to doubt the liability of the Defendants, though they have denied that liability upon their answer. One of the arguments relied upon in the case of *The Bank of England* v. *Anderson* was, that the acceptors would not come within the prohibitory clause, because the accepted bills were the bills of the drawers, and consequently not *their* bills; but what were the observations of Chief Justice *Tindal* on that argument? "It was objected in the third place, that even if there was a borrowing by the Defendants, they have not borrowed 'on their bills;' and that the statute prohibits only borrowing 'on their bills or notes.' But we are of opinion that if the bankers are to be held borrowers, and the acceptance of the bill drawn upon them is the security they give for the debt, they do, in common parlance, borrow on their bills when they borrow on their acceptances. The acceptor is as much a party to the bill as the drawer; indeed, he is the person primarily liable on the bill, as soon as he becomes a

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party to it by giving his acceptance. But, after all, the expression both in the statute of *Anne* and the subsequent acts, of 'their bills or notes' may only have been used to distinguish them from the bills or notes of the Bank of *England;* and if the interpretation of the statute could be otherwise held, what an opportunity would be afforded for evading the prohibition in the statute." Now, the Defendants avow their intention of evading the act, or of avoiding its provisions; and the distinction, if any, between "evading" and "avoiding" is one which can receive no sanction in a court of equity. Whether they infringe the letter of the act or not, they violate its spirit, and that is a violation which a court of equity will not permit. The collateral engagement of the *London* Joint Stock Bank to pay the bill gives the same credit to it as if their names were upon it: their avowed purpose is to give a credit to such bills of exchange as the law has said shall not be given to them, and that is a purpose which this Court will restrain them from carrying into effect.

June 16.

The MASTER *of the* ROLLS.

The object of the motion made by the Bank of *England* in this case is, to restrain the *London* Joint Stock Bank from borrowing, owing, or taking up, in *England* any sum or sums of money on their bills of exchange, payable on demand, or at any less time than six months from the borrowing thereof.

The *London* Joint Stock Bank is a partnership consisting of more than six persons, who carry on the business of bankers in *London*. Mr. *George Pollard* is their manager, but is not a partner or shareholder.

The

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The Commercial Bank of the Midland district is a banking partnership, carrying on business at *Kingston* in *Upper Canada*. Mr. *John S. Cartwright* is their president, and *F. A. Harper* is their cashier.

In the spring of 1837, the Commercial Bank desired to employ the *London* Joint Stock Bank as their *London* agents, and to obtain from them advances of money to a large amount, and for that purpose to draw upon them bills of exchange sixty days after sight.

The *London* Joint Stock Bank, conceiving that to accept such bills might be a violation of the privileges enjoyed by the Bank of *England*, and, having been apprised by the Bank of *England* that it would be so considered (by letter, dated the 6th of *May*, 1837, and addressed by *Pollard* to *Harper*), proposed to the Commercial Bank to adopt either of these two expedients; first, that the Commercial Bank should issue promissory notes, payable at the *London* Joint Stock Bank; or secondly, that the Commercial Bank should draw upon "*George Pollard*, manager of the *London* Joint Stock Bank, *London*;" and that the due payment of the manager's acceptances should be guaranteed by the *London* Joint Stock Bank.

In answer to these proposals, the Commercial Bank in a letter, dated the 21st of *June*, 1837, and addresssed by *Harper* to *Pollard*, expressed themselves as follows: "The Board have also taken into consideration both the modes you propose for valuing on you so as not to come within the power of the act in favour of the Bank of *England*, and prefer that of drawing on you, as manager, at sixty days sight, being the dates at which bills are commonly negotiated, and which the public would prefer. Such being their decision, please send me the

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guarantee of your bank to protect the drafts of the president of this institution.

In anticipation of the guarantee being sent, *John S. Cartwright*, the president of the Commercial Bank, drew upon *George Pollard* a bill of exchange, which was expressed as follows: —

"1000*l.* sterling. *Kingston, Upper Canada*, 25th *July*, 1837. Sixty days after sight, pay this, my first of exchange (second and third unpaid) to the order of *F. A. Harper*, cashier, the sum of 1000*l.* sterling value received, which place to account of the Commercial Bank, Midland district, with or without further advice. *John S. Cartwright*, president, to *George Pollard*, Esq., manager, *London*, Joint Stock Bank, *London*."

About the time when this bill was drawn in *Canada*, the *London* Joint Stock Bank received the letter of the 21st of *June*, containing the information that the Commercial Bank preferred the mode of valuing by drawing bills on *George Pollard*, as manager; and thereupon, by letter dated the 29th of *July*, 1837, and addressed by *Boyle*, their secretary, to the president and directors of the Commercial Bank, they communicated to the Commercial Bank their approbation of the mode of drawing which the Commercial Bank had selected, and sent to *Canada* a guarantee signed by six trustees, and expressed as follows: —

"To the Commercial Bank of the Midland district, *Upper Canada*, *London*, 26th *July* 1837. Gentlemen.—In consideration of your keeping a banking account with the *London* Joint Stock Bank, we, as trustees of the company, hereby engage that the capital stock and funds of the company shall be liable to you for, and shall make good

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good to you any balance that may become due to you on your current or other account with it; and that the said *London* Joint Stock Bank will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by your bank upon, and accepted by Mr. *George Pollard*, manager of the said *London* Joint Stock Bank. We are, &c." Signed by six trustees.

They also sent to the Commercial Bank the form of an agreement (which in the month of *September* following was duly signed), whereby the Commercial Bank agreed to pay to the trustees of the company on demand such sums of money as might at any time be due from them to the *London* Joint Stock Bank; and advertisements, stating the connection between the two companies, but not adverting to the peculiar nature of this arrangement as to bills of exchange, were published.

The bill of the 25th of *July*, 1837, was received by the Bank of *England* about the end of *September*, and was presented for acceptance on the 2d of *October;* and was then accepted by Mr. *Pollard* in the manner and form following: —

"Accepted 2d *October*, 1837, at the *London* Joint Stock Bank. *George Pollard.*"

The Bank of *England* objected to the form of this acceptance. Mr. *Pollard* refused to alter it, and after some discussion the bill was paid under discount.

The *London* Joint Stock Bank, however, now carry on, and claim to be entitled to carry on their business as agents of the Commercial Bank in *Canada;* and they make, and claim to be entitled to make, advances to the last-mentioned bank, upon or by means of bills of exchange,

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change, drawn on *George Pollard*, and accepted by him under the arrangement and guarantee before mentioned; and the only alteration made, or proposed to be made, in the form of the bill, is to omit the word "manager" in the address to *George Pollard*.

The question is, whether this course of proceeding is legal under the Bank Acts, the last of which is the statute 3 & 4 *W.* 4. *c.* 98.

The third section of the act permits any partnership (although consisting of more than six persons) to carry on the business of banking in *London*, provided that such partnership do not, during the continuance of the privileges of the Bank of *England*, borrow, owe, or take up in *England* any sum or sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof.

The effect of that clause was much considered in the case of the *Bank of England* v. *Anderson*, and, not being aware of any reason for doubting the judgment of the Court of Common Pleas in that case, I must, on the present occasion, assume that it was rightly decided. And the *London* Joint Stock Bank being a partnership consisting of more than six persons, and carrying on the business of banking in *London*, and the bills which are accepted by *George Pollard* in the course of the dealing before described, being payable sixty days after sight, the question seems reduced to this; whether, in the course of this dealing, and in respect of bills so accepted, the *London* Joint Stock Bank do or do not owe money in *England* on their bills.

As the Bank Acts were made for the purpose of giving effect to an agreement between the Bank of *England* and the

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the public, for which valuable consideration was given by the Bank, they must be construed, and effect must be given to them, according to the intent and meaning of them, so far as the intent and meaning can be discovered by fair and just construction. And it must be observed, as was argued for the Plaintiffs, that, if the expedient which has in this case been adopted for evading the statute should be successful, there seems to be no reason why the Defendants, the *London* Joint Stock Bank, might not, in the name of their agent Mr. *Pollard*, issue promissory notes payable on demand to any amount; and it would not be difficult to suggest indirect means by which such notes might be made to circulate on the credit of the company.

It is admitted, on behalf of the *London* Joint Stock Bank, that their object has been, and is, to avoid the provisions of the Bank Acts. They allege that accepting bills in the manner before described is not within the strict letter and meaning of the act; that they have a right to do every thing which is not strictly and directly forbidden; and their argument is that, as the *London* Joint Stock Bank are not by that name, and in that character, parties to the bills, the bills are not "theirs," and they do not owe money upon them.

But admitting that an indorsee, a stranger to the transactions and arrangement between the *London* Joint Stock Bank and the Commercial Bank, who had not received the bill on the credit of the *London* Joint Stock Bank, would have no right to consider the *London* Joint Stock Bank as acceptors or parties to the bill, the question is not thereby disposed of.

It is to be considered what is the relation between Mr. *Pollard*, the *London* Joint Stock Bank, and the Commercial

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Commercial Bank, in these transactions and in respect of these bills.

Pollard is a mere agent without any personal interest; his office is to do something by which the two banks are enabled to transact their business together in the manner they desire; he does this by the authority, and for the profit, of the *London* Joint Stock Bank; he was never meant to be primarily, if at all, liable to the Commercial Bank, the drawers of the bills; as between him and them, he has entered into no contract to pay. He and they rely on the *London* Joint Stock Bank, who have not contracted to become liable in case of his failure to pay, but have contracted to provide funds for payment of the bills accepted by him at maturity. They do that which would belong to them or be their duty as acceptors; and the bills are avowedly drawn in the transaction, and for the purposes of their business as agents and correspondents of the Commercial Bank; and under these circumstances I think, that the bills may without impropriety or any strain of language be called *their* bills. Their names are not upon the bills as parties: but they are the persons who authorised the drawing—authorised the acceptance—are bound to provide for the payment—and are entitled to the profit arising from the acceptance and payment. I have no doubt that they consider these bills as their bills, at least in the sense of their having to provide funds for paying them; and for the purposes of the Bank Acts, I think that the law must also consider the bills to be theirs.

It appears to me, also, that they owe money upon the bills when accepted; for, although they are not parties, and may not be liable to an indorsee, who has not received the bills on their credit, yet, as regards the drawers, they are under an obligation to do that which is

is equivalent to payment, namely, to provide the funds to enable their agent to pay. Their obligation arises upon the acceptance by their agent; they then owe or become liable to pay (in this case the expressions are equivalent) the sum which is due on the bills. In all transactions and accounts between the two banks, the existence of of this obligation or liability must undoubtedly be recognised; and, for neglect of the duty which they thus contract to perform, they are answerable to the drawers.

It was argued, indeed, that the *London* Joint Stock Bank, not being parties to the bill, cannot be sued upon the bills themselves, and for that reason cannot be deemed to owe money upon the bills; that the engagement to provide the money for payment is collateral, and an obligation upon that collateral agreement is no obligation upon the bills.

I do not, however, think it necessary to give any opinion upon the question, whether the *London* Joint Stock Bank can be sued directly upon such bills as these or not.

For the reasons I have stated, it appears to me that they owe money on the bills; and I think that this conclusion is in no way affected by the form of the action or suit in which they might be compelled to satisfy their obligation.

On the whole, therefore, I am of opinion that the privileges to which the Bank of *England* is entitled by virtue of their agreement with the public, confirmed by the statutes, are violated by such acceptances as have been made in this case; and that an injunction ought to be awarded.

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Let an injunction be awarded to restrain the society or partnership called the *London* Joint Stock Bank, and every partner therein, and the Defendant *George Pollard*, and every clerk, servant, or agent of the same partnership, from accepting, or causing to be accepted, in the name of the said partnership, or in the name of the said *George Pollard*, or any other name on behalf of the said partnership in the course of their banking transactions, any bill or bills of exchange payable on demand, or at any less time than six months from the acceptance thereof.

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THE decision in this case (*suprà*, p. 136.) was appealed from, and affirmed by the Lord Chancellor.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

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June 1, 2. 12.

In the Cause of DUFFIELD *v.* ELWES.

Where a solicitor has neglected to take out his certificate for more than a year, admission *de novo* is in no case necessary, (the words "null and void," as applied to his admission in the 37 *G.* 3. *c.* 90. *s.* 31. being used in a qualified sense), and re-admission will restore him to a capacity to practise, unless he has been guilty of some fraud in procuring it.

Whether re-admission is necessary, in a case where an attorney or solicitor has not taken out his certificate nor practised for more than a year after his admission, *quære*.

A *motion*, on behalf of a person who had obtained an order for the taxation of his solicitor's bills of costs, to discharge that order, and to have it declared that his solicitor was incapable of acting as such under the 39 *G.* 3. *c.* 90., and consequently not entitled to claim his bills of costs, was held to be open to objection, (if properly taken), for irregularity; the Court considering that such an application ought to have been made by petition.

MR. *HENRY WILTON* was admitted and enrolled as an attorney in the Court of King's Bench, on the 17th of *May* 1810, and a solicitor in the Court of Chancery on the 5th of *June* following. He did not practise as an attorney or solicitor until the 21st of *April*

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April 1813, when, for the first time, and without being re-admitted, he took out his certificate. He afterwards practised, and continued to do so, and to take out his certificate, though not quite regularly, till the year 1820, the period, for which his last certificate was taken out, expiring on the 12th of *November* in that year. From that time, till *January* 1826, he ceased to practise or to take out his certificate. He was re-admitted an attorney of the Court of King's Bench in *Trinity* term 1823, about two years and a half before he resumed his practice. On the 10th of *June* 1826, he took out his certificate in the Court of King's Bench, and about the same time was admitted an attorney of the Court of Common Pleas. On the 16th of *November* 1826, he was re-admitted a solicitor in the Court of Chancery; and shortly afterwards he was employed by *Abraham Henry Chambers*, as his attorney and solicitor in matters relating to the bankruptcy of *Chambers;* and in the course of these transactions, he procured several warrants of attorney, and other instruments, to be executed by Mr. *Chambers*, as securities for costs. He took out his certificate regularly during the continuance of the transactions in question.

In *Hilary* term 1837, a rule was obtained, on behalf of Mr. *Chambers*, in the Court of King's Bench, calling upon Mr. *Wilton* to shew cause, why the securities for costs which he had procured from Mr. *Chambers* should not be vacated. This rule was argued and made absolute in the following *Michaelmas* term, the Court being of opinion, that Mr. *Wilton*'s re-admission in 1823, was void, on the ground that no certificate had been taken out upon his re-admission, nor in fact, for more than one year afterwards. (*a*) On the 22d of *October* 1836, Mr.

(*a*) *Wilton* v. *Chambers*, 2 *Nev. & Per.* 392.

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Mr. *Chambers* obtained an order in this Court for the taxation of Mr. *Wilton*'s bills of costs; a motion was now made, on behalf of Mr. *Chambers*, to discharge that order, and to have it declared, that Mr. *Wilton*'s re-admission as a solicitor of this Court in *November* 1826, was void, and that Mr. *Wilton* was incapable of acting as a solicitor.

Mr. *Pemberton*, Mr. *Temple*, and Mr. *Dixon*, in support of the motion, relied upon affidavits, shewing that Mr. *Chambers* and his solicitor, at the time of obtaining the order of the 22d of *October* 1836, were ignorant of the facts, by reason of which, Mr. *Wilton* was, as they contended, incapable of acting as a solicitor during the period he was employed by Mr. *Chambers*, and consequently not entitled to recover any costs or remuneration in respect of such employment. The admission of Mr. *Wilton* in the Court of King's Bench, in the year 1810, gave him an inchoate right to be admitted as an attorney or solicitor in any other Court, which he might have perfected by taking out his certificate within a year after his admission, in compliance with the 37 *G.* 3. *c.* 90. If the admission which he obtained in the Court of King's Bench was void, the admission which he obtained in this Court, and which was founded upon his original admission, must be equally void. The principal provisions of the 37 *G.* 3. *c.* 90., relating to the admission of attorneys and solicitors, were comprised in the twenty-sixth, thirtieth, and thirty-first sections. The twenty-sixth section enacted, that every person admitted, sworn, enrolled, or registered as an attorney or solicitor in any of his Majesty's Courts at *Westminster*, or in any other court in *England* holding pleas, should annually between the 1st of *November* and the end of *Michaelmas* term then next following, during such time as he should continue to practise in any of the said Courts, or before

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such person should commence, carry on, or defend any action or suit, or any proceedings whatsoever, in any of the said Courts, deliver in to the commissioners appointed to manage the duties on stamps, a note containing his name and place of residence, in order to obtain a certificate. The thirtieth section imposed a penalty upon any person who should act as an attorney or solicitor without a certificate; and the thirty-first section enacted as follows, "that every person admitted, sworn, enrolled, or registered in any of the said Courts, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said Courts, by virtue of such admission, entry, enrolment, or register; and the admission, entry, enrolment, or register of such person, in any of the said Courts, shall be from thenceforth null and void; provided always, that nothing hereinbefore contained, shall be construed to prevent any of the said Courts, from re-admitting any such person, on payment to the said commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money by way of penalty, as the said Court shall think fit to order and direct." Mr. *Wilton* having neglected to take out his certificate, for three years after his original admission, that admission, and, by consequence, the admission which he obtained in the following month in this Court, was void. His re-admission in the Court of King's Bench in 1823, had, by the decision of that Court, been declared void, by reason of his not having taken out a certificate within one year after the re-admission. *Wilton* v. *Chambers.* (*a*) The Court was not, in that case, called upon to decide upon

(*a*) 2 *Nev. & Per.* 392.

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upon the invalidity of the original admission; but the very term "re-admission" was, in fact, an improper one, the original admission being, by the failure of Mr. *Wilton* to take out his certificate in compliance with the statute, a mere nullity. If the rule of law, which had been determined by the Court of King's Bench, was to prevail, the re-admission of Mr. *Wilton* in this Court, must follow the fate of that which has been pronounced invalid by the Court of King's Bench. The affidavit upon which he was re-admitted here, stated that he regularly took out his certificates, from the time of his admission until the year 1820, a mis-statement which would, of itself, be sufficient to invalidate his re-admission, even if there were any doubt as to its invalidity, upon the ground of its being affected by the operation of the statute.

In *Ex parte Nicholas* (*a*), it was held by Sir *Vicary Gibbs*, that the admission of an attorney, who had neglected to take out his certificate for one whole year after his admission, was absolutely void. It is true that in *Ex parte Jones* (*b*), Mr. Justice *Parke* expressed an opinion, that an attorney, who had not practised for more than a year after his admission, and had omitted to take out his certificate, required no re-admission. But that was an *ex parte* application; no case was cited, and the observation which fell from the Judge, cannot be considered, as over-ruling an express decision, to which his attention was not directed. Such was the view of *Ex parte Jones* taken by Lord *Denman*, in delivering the judgment of the Court in *Wilton* v. *Chambers*. (*c*) And in *Hilleary* v. *Hungate* (*d*), Mr. Justice *Littledale*, referring to

(*a*) 6 *Taunt.* 408.; and 2 *Marsh.* 123.

(*b*) 2 *Dowl. P. C.* 451.

(*c*) 2 *Nev. & Per.* 400.

(*d*) 3 *Dowl. P. C.* 61.

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to *Ex parte Jones*, though he certainly expressed some concurrence in the opinion of Mr. Justice *Parke*, observed, that he could not consider that case as overruling the decision of the full Court of Common Pleas in *Ex parte Nicholas.*

Mr. *Kindersley* and Mr. *James Russell, contrà.*

This is a motion, seeking to rescind an order, obtained by the party himself who makes the application, and calling upon the Court for a declaration, that Mr. *Wilton*'s re-admission in this Court was void, the effect of which will be, to deprive him of all title to remuneration for the services which he has performed for Mr. *Chambers.* Such an application ought not to be made by motion, but by a petition in the cause, fully stating all the circumstances upon which it is founded, and shewing distinctly, the grounds upon which the Court is asked to make a declaration, which, even if it could be supported by technical reasons, is manifestly contrary to the justice of the case. The acts expressly enacted for the regulation of attorneys and solicitors, are the 2 *G.* 2. *c.* 23. and the 12 *G.* 2. *c.* 13.; the act of the 37 *G.* 3. *c.* 90. which is relied upon by the other side, being an act for the imposition of duties on the admission of attorneys and solicitors, its provisions which are merely fiscal, are not to be so construed as to encroach on the rights of attorneys and solicitors, once admitted, further than may be necessary for fiscal purposes. All the cases shew that such is the construction which has been put upon the provisions of this act.

In *Coren* v. *Sharpe* (*a*), it was held, that an attorney who had been disqualified from practising, by omitting to take out his certificate, and had obtained a rule of court

(*a*) 1 *B.* & *Ad.* 386.

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court for his re-admission, might maintain an action, for business done after he obtained the rule, but before he had caused his re-admission to be entered at the Master's office. It is clear from that decision, that the admission of an attorney after failure to take out his certificate for a year, is not absolutely null and void, but only in a qualified sense.

In *Hodkinson* v. *Mayor* (*a*), an attorney, who had neglected to obtain his certificate, was held not to be liable to the penalty imposed, by the 7th section of the 12 *G.* 2. *c.* 13., for practising in the County Court.

In *Ex parte Matson* (*c*), it was held, that an attorney who discontinued to practise, after his last certificate had expired, might be re-admitted without payment of any arrears of duty, or any fine, the word "neglect" in the thirty-first section of the 37 *G.* 3. *c.* 90, being held to mean "culpable neglect."

In the case of *In re Hodgson* v. *Ross* (*c*), the Court held, that a person who had been examined, sworn, and admitted as an attorney, but who was off the rolls, by reason of his not having taken out his certificate for one whole year, was not an unqualified person within the meaning of the eleventh section of the 22 *G.* 2. *c.* 46., so as to subject him to the penal provisions of that act, for practising in the name of another attorney. The Court gave no opinion as to the case in which an attorney might have been struck off the rolls for misconduct, but all the Judges concurred, in holding that the words "null and void," in the 37 *G.* 3., must be taken with some qualification. It is said that the term "re-admission,"

(*a*) 1 *Nev. & Per.* 397.
(*b*) 2 *Dowl. & Ryl.* 238.
(*c*) 3 *Ad. & Ell.* 224.

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admission," is an improper one as applied to Mr. *Wilton*'s re-admission in the Court of King's Bench, the validity of which was the subject of discussion in *Wilton* v. *Chambers*, because the original admission was a mere nullity. But is not the term "re-admission," the term used in the statute, and is it not a sounder argument to contend, that because this is the term used in the statute, the original admission was never meant to be made a mere nullity, and to become absolutely void? The case of *Ex parte Jones* shews that re-admission is unnecessary, where the party admitted has never taken out a certificate, and never attempted to practise without a certificate. Re-admission is only necessary, where the attorney or solicitor has taken out a certificate or certificates, and practised, and has afterwards discontinued to do so. It is with reference to that case only, that the Court of King's Bench, in *Wilton* v. *Chambers*, decided as to the invalidity of a readmission not followed by taking out a certificate, no question whatever having been raised as to the validity of an original admission not so followed. If however, the Court should be of opinion, that re-admission is necessary, where there has been an omission to take out a certificate for more than a year, the statute would apply as well to such an omission in the first year after the attorney or solicitor has been admitted, as to an omission in any subsequent year; and it could never have been intended to place an attorney or solicitor, who had never taken out his certificate, in a worse situation than one who had taken out his certificate, and afterwards discontinued to do so. As to the statement in Mr. *Wilton*'s affidavit with respect to his having regularly taken out certificates till the year 1820, it was not necessary to make any such statement, and the inaccuracy is clearly referable to mistake.

Mr.

Mr. *Temple*, in reply.

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It is clear from the judgment of Lord *Denman* in *Wilton* v. *Chambers*, that re-admission is put upon exactly the same footing as the original admission, in respect of its liability to be rendered void, by omission to take out a certificate within a year. If therefore, the original admission is void, there can be no re-admission upon that void admission; and every admission or re-admission in another court, founded upon the original admission, must be equally void. That the statute which allows re-admission in certain cases does not extend to the case of an omission to take out a certificate for a year after the original admission, is evident from this circumstance — that the re-admission is only to be on payment to the said commissioners of the duty accrued since the expiration of the *last certificate* obtained by such person. *Ex parte Jones* is at variance with all the other cases; and after the observations made by Lord *Denman* in *Wilton* v. *Chambers*, cannot be recognised as an authority.

The MASTER *of the* ROLLS (after stating the facts). *June* 12.

It has been determined in the Court of King's Bench, that the re-admission of Mr. *Wilton*, as an attorney of that Court in 1823, was void, in consequence of his neglect to take out his certificate for more than twelve months after the time of the re-admission. This reason is not applicable to the re-admission of Mr. *Wilton* as a solicitor of this Court. But it is argued that a re-admission implies, and can only be founded on a valid original admission; and that the original admission of Mr. *Wilton* in 1810 was, under the statute 37 *G.* 3. *c.* 90., rendered wholly void by his neglect to take out his certificate till *April* 1813.

Attorneys

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Attorneys and solicitors acquire their characters, as such, by admission in the courts in which they mean to practise; and they are not to be admitted, unless they have served as clerks, and have been examined and sworn. And by the statute referred to, it is provided that every solicitor or attorney, shall annually deliver, a note containing his name and place of residence, to the commissioners of stamps, and shall thereupon, and upon payment of the duty imposed upon him, be entitled to his certificate. He is subject to a penalty, if he practises without obtaining his certificate; and the thirty-first section provides, that every person admitted, who neglects to obtain his certificate for the space of one whole year, shall from thenceforth be incapable of practising in any court by virtue of such admission, and that the admission shall be from thenceforth null and void; provided that any of the courts may re-admit him, on payment to the commissioners of stamps, of the duty accrued since the expiration of the last certificate, and such further sums by way of penalty, as the Court shall think fit to order.

Upon the construction of the statute, it has been decided, that the word neglect, does not mean merely omission; it does not mean, omission to take out the certificate whilst the party was not practising, or an omission occasioned by the negligence of a clerk or agent, but omission whilst practising, and attended by culpability. In that case, if the omission be continued for more than a year, the statute imposes an incapacity to practise by virtue of the admission, and makes the admission null and void; but at the same time gives the Court a power to re-admit, from which it plainly appears that the words "null and void," are to be taken in a qualified sense. The statute, as was stated by Chief Baron

Baron *Richards* in *Jones* v. *Stevens* (*a*), occasions a suspension of the capacity of the attorney or solicitor to act, but does not wholly destroy the character; it imposes on him the necessity of being re-admitted, rendering him incapable of practising until that be done.

And accordingly, the cases are very numerous in which attorneys and solicitors duly admitted, and having at first taken out their certificate, but afterwards omitted to do so for more than a year, have been re-admitted even without payment of arrears of duty, and without penalty, or with a nominal penalty.

The cases in which no certificate has been taken out within a year after the admission, are not so numerous. In *Ex parte Jones*, Mr. Baron *Parke*, when a Judge of the Court of King's Bench, considered that an attorney, who had not taken out his certificate, and had not practised for more than a year after his admission, was entitled to take out his certificate without re-admission. In *Exparte Nicholas*, Sir *Vicary Gibbs*, then Chief Justice of the Common Pleas, considered that in that case a re-admission was necessary; and in *Ex parte Adey*, a case which is not reported, I find that in the like circumstances, Lord *Eldon* considered that a re-admission was necessary, or at least proper.

These are all the cases of which I am aware; and the question has been, not whether the admission had become absolutely null and void, but whether re-admission was or was not necessary. It was never suggested that an admission *de novo* was required.

If re-admission was not necessary, Mr. *Wilton* practised regularly from 1813 to 1820, and was duly re-admitted

(*a*) 11 *Price*, 263.

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admitted in 1826. And if we suppose this to be a case, in which re-admission was necessary, then whatever might be the effect of the transactions in which Mr. *Wilton* practised between the years 1813 and 1820, yet as he was re-admitted before he acted as the solicitor of Mr. *Chambers*, he was restored to a capacity to practise by that re-admission, unless he was guilty of some fraud in procuring it; and no evidence of such fraud is now produced.

I am, therefore, of opinion, that this motion so far as it seeks a declaration that the re-admission of Mr. *Wilton* was void, and that he was incapable to act as a solicitor, cannot be sustained, and must be dismissed with costs; and that the motion, so far as it seeks to discharge the order for taxing Mr. *Wilton*'s bills of costs, cannot be granted without the consent of Mr. *Wilton*.

Considering that the objection to this application in point of form, was not taken till the case was fully opened on the part of Mr. *Chambers*, I have thought it right to decide it upon the merits; but I think that, in point of form, the application ought to have been made by petition, and that an application of this sort by motion is irregular.

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June 4. 9.
July 9.

On a motion made on behalf of a Defendant who is in contempt for want of appearance, the Defendant cannot be heard without entering a conditional appearance with the Registrar, to be void if the application should succeed, and good, if it should fail.

Service of a *subpœna* at the dwelling-house in *London* of a peeress of *Scotland*, who was absent in *Scotland*, and claimed to be a domiciled *Scotchwoman*, was held to be good service; and the Court held, that an order *nisi* for a sequestration was regularly obtained, and made absolute, after personal notice of the order *nisi*, which was served upon the Defendant in *Scotland*.

THIS was a motion to discharge the orders for a sequestration, and to set aside the writ of sequestration obtained by the Plaintiffs against the Defendant, the Marchioness of *Hastings*, on the ground of irregularity.

When this motion was first made on behalf of the Defendant, it was objected by Mr. *Pemberton*, for the Plaintiffs, that the Defendant could not be heard without entering a conditional appearance with the registrar, to be void, if the application succeeded, and if it failed, to be good. That objection was allowed by the Court, and the motion stood over to give the Defendant an opportunity to enter such conditional appearance.

It appeared, at the hearing of the motion, that up to the 11th of *September* 1837, Lady *Hastings* resided at *Noel House*, *Kensington*. On that day she left servants of her own there, and went to *Scotland*. The bill was filed on the 15th of *December* 1837, by the Plaintiffs, who were the representatives of a creditor, claiming under a bond given by Lord and Lady *Hastings*, it being alleged by the bill that Lady *Hastings* was liable thereon in respect of her separate estate. On the 22d of the same month in which the bill was filed, the clerk of the Plaintiff's solicitor went to *Noel House*, and was there informed by a servant of Lady *Hastings*, that that was her residence, and that she was gone to *Scotland*, where she would remain for some months. On the 18th of *January*

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January last, the Plaintiffs' solicitor, having obtained a letter missive and an office copy of the bill, again attended at *Noel House*, and being then informed, that Lady *Hastings* was expected to return in *March*, and that the servant had orders to forward all letters and inclosures, he delivered to, and left with the servant, the letter missive, a copy of the petition for it, a copy of the order of the Lord Chancellor thereon, and an office copy of the bill; and he, at the same time, produced to the servant the original petition and order.

No notice being taken of the letter missive, the clerk of the Plaintiffs' solicitor, on the 5th of *February*, again attended at *Noel House*, and there met with another servant of the Defendant, who also informed him, that that was the residence of the Defendant, who was then in *Scotland*, where she usually went for some months in the year; and that she was expected to return, but not before *March* then next; and the same servant further informed the clerk, that the papers formerly left, meaning the letter missive, the copies of the petition and order, and the office copy of the bill, had been forwarded to Lady *Hastings*. Under these circumstances the clerk, on the same 5th of *February*, served her ladyship with a *subpœna* to appear and answer the bill, by delivering to and leaving with her servant at *Noel House*, a true copy of the *subpœna* and of the indorsement thereon, and at the same time shewing to the servant the original *subpœna* under seal.

No attention was paid to the *subpœna*, and upon affidavit of the service (no irregularity appearing), an order *nisi* for a sequestration was obtained on the 24th of *February;* and this order was personally served on Lady *Hastings* in *Scotland*.

Upon

Upon affidavit of that service, the order *nisi* was made absolute; and the writ of sequestration, which it was the object of the present motion to set aside, was issued.

For the Defendant, Lady *Hastings*, it was contended that the service of the *subpœna* was irregular, inasmuch as her domicile was at *Loudoun Castle* in *Scotland*, and *Noel House* could not be considered as her ordinary town residence, that, consequently, in this respect the case differed from *Thomas* v. *The Earl of Jersey* (*a*). It was further argued, that the order *nisi* for a sequestration could not be made absolute without personal service, and the attempt to serve the Defendant personally had been made in *Scotland*; That there was no authority to shew, that service upon a party out of the jurisdiction, could be considered as equivalent to personal service, for the purpose of affecting the property of the party by the process of the Court.

On the other side it was insisted, that it appeared clear, even from the affidavits made on the part of the Defendant, that *Noel House* was her town residence, and that the case therefore, was not, in that respect, distinguishable from *Thomas* v. *The Earl of Jersey*; that Lady *Hastings* had expressed her intention of returning to *Noel House*, which intention, if it had been subsequently abandoned, was in all probability abandoned, only in consequence of the information which she had received, respecting the proceedings in question. As to the service of the order *nisi* for a sequestration, it was admitted by the affidavit of Lady *Hastings*, that she had been personally served with that order; That the objection, that the service was made out of the jurisdiction, could not prevail, because the sole object of personal service in this case, was

(*a*) 2 *Mylne & Keen*, 393.

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was to give notice to the Defendant, that if she shewed no cause to the contrary, the order of the Court would be made absolute; this notice was here admitted. The Court, upon application, would have substituted service in such a case, and could it be contended, that direct notice was not equivalent to the notice which might or might not have actually reached the Defendant through the medium of substituted service? If the objection raised on the part of the Defendant could prevail, the creditors would be wholly without remedy.

Mr. *Kindersley* and Mr. *G. Richards*, for the Defendant Lady *Hastings*.

Mr. *Pemberton*, *contrà*.

July 9.

The MASTER *of the* ROLLS (after stating the facts).

There are two alleged irregularities; — one in the service of the *subpœna*, the other in the service of the order *nisi* for a sequestration.

If the *subpœna* was irregularly served, all the subsequent proceedings were irregular, and ought to be set aside. If the *subpœna* was regularly served, the order *nisi* for a sequestration was regularly obtained, and any irregularity in the service of that order would affect only the order absolute, and the writ.

The affidavit of Lady *Hastings*, is to the effect that she left *England* for *Loudoun Castle*, in *Scotland*, on the 11th of *September* 1837; that *Loudoun Castle*, in *Scotland*, is her residence; that she has continued to reside there from the 11th of *September* to the day of swearing her affidavit; that she has no present intention of returning to *England*, but permanently to reside in *Scotland*;

land; that she did not leave *England* to avoid the process of the Court; and that she is, according to the law of *Scotland*, a domiciled *Scotch* woman.

This affidavit is not contradicted; but it is extraordinary that Lady *Hastings* should have been advised to swear it on this occasion.

She does not deny, or produce any evidence to contradict, the facts sworn to, that *Noel House* was her dwelling-house in *London;* that her servants were left there with orders to forward letters and inclosures to her; that the information they gave as to her intention to return was true; that she actually received the letter missive, the office copy of the bill, and the copy of the *subpœna;* or that the original writ of *subpœna* was shewn to her servant at her dwelling-house. All these facts are left uncontradicted; and the affidavit of Lady *Hastings* is confined to circumstances quite consistent with them.

Now, by the general rules of the Court, the *subpœna* is well served by leaving a copy of it, and of the indorsement thereon, at the dwelling-house of the Defendant, and producing the original writ to the person with whom the copy is left. All this was done in the present case; and I am, therefore, of opinion that the service of the *subpœna* was regular. I have inquired as to the practice, and am informed, that it is the constant course to issue process of contempt against unprivileged Defendants, upon non-appearance, after such service as this.

I am therefore of opinion, that the order *nisi* for a sequestration, was regularly obtained. This order is, by the terms of it, to be made absolute, unless the Defend-

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ant, having personal notice thereof, shall, within a limited time, shew good cause to the contrary.

In this case, the Defendant had personal notice of the order, and did not shew cause why it should not be made absolute: but the objection is, that she received the notice in *Scotland*, when out of the jurisdiction of this Court.

In cases where the Defendant, against whom an order *nisi* for a sequestration has been obtained, is out of the jurisdiction, the Plaintiff is not bound to go out of the jurisdiction for the purpose of giving personal notice of the order. To the end that justice may not be defeated, the Court will order service at the dwelling-house of the party to be good service. And in this case, if the Plaintiff, instead of giving personal notice in *Scotland*, had applied for an order to substitute service at the dwelling-house, instead of personal service, such order would have been granted, and the order *nisi* would have been made absolute, if cause had not been shewn to the contrary, within the limited time after such substituted service.

But I apprehend, that in cases of this nature, the object or intention of substituted service at the dwelling-house, is to obtain, if possible, by secondary or subsidiary means, that personal notice, which in ordinary cases, the Plaintiff is bound to give directly, but which, under the particular circumstances, he cannot give at all, if he is unable to find the Defendant, or cannot give without great inconvenience, if the Defendant be out of the jurisdiction.

The Defendant having a dwelling-house within the jurisdiction, and servants residing there, but being temporarily

temporarily absent, there is great probability that notice given there will be personally communicated to the Defendant. The Court may act upon that probability, and, in the absence of any reason to the contrary, attribute to the Defendant a personal knowledge of notice so given. The probability of personal knowledge, may be affected by various circumstances which may occur, and to which the Court must attend in each case; and when a personal notice is actually given, the subsequent proceedings, both as to time and otherwise, may be qualified by the consideration, which the Court may give to the circumstances, under which the personal notice was received; but when there is really a personal notice, it may reasonably be asked, what would be the use of a substituted service?

The fact of personal notice, which the exigency of the order *nisi* requires, being satisfactorily proved, why are we unnecessarily to resort to the substituted service, which, at best, affords us the means of obtaining only an imperfect, and not always satisfactory, presumption of the same fact?

At the time when this motion was heard, I thought that authorities on this subject might be found. In this I have been disappointed. There was a case before Lord *Eldon*, in which an order for substituted service was made, upon an affidavit that the plaintiff had unsuccessfully endeavoured to serve the defendant personally in *Ireland;* but the order does not shew that personal notice in *Ireland* would have been held sufficient. I have, however, received from several officers of this Court, who have taken the trouble to inquire into the subject, a certificate, that in their opinion, the personal service of an order *nisi* for a sequestration

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on a defendant out of the jurisdiction, does entitle the plaintiff to make such order absolute.

The sole object of the service is notice; and in that respect, it differs from the service of writs in process, which are commands requiring something to be done by the party named in the writ; and if obedience be not yielded to these commands in writs of *subpœna*, or writs of execution, the course is to issue other writs affecting the person of the Defendant, and which cannot be executed out of the jurisdiction.

The Court, therefore, except in cases authorized by the recent statutes, does not sanction the service of a *subpœna* out of the jurisdiction. But the case of a notice like this, is widely different. Notice of the order *nisi*, being given and neglected, there is nothing to be done out of the jurisdiction: the single consequence is, that the writ which is to be executed within the jurisdiction issues. There is nothing to be done, which is not fully within the power of the Court; and the Defendant, having notice, has the means of obviating any thing which might be done to her prejudice in her absence.

Under all the circumstances, it does not appear to me that the service of the order *nisi* was irregular; and if the Plaintiff insists upon it, I shall refuse to discharge the order absolute, or to set aside the writ of sequestration.

But, considering that no authority upon this point has been found; that Lady *Hastings* must now, in pursuance of her undertaking, appear in the regular way, and may probably desire to answer, and thereby prevent the continuance of process of contempt against her; it appears to

to me that it might be reasonable to make some proper arrangement, by which she may have time for the purpose; and, upon such arrangement, the further execution of the writ might be stayed.

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The execution of the writ of sequestration was suspended, upon payment of costs by the Defendant.

M'DONALD *v.* BRYCE.

July 3.

THIS cause (*a*) was again brought before the Court, for the purpose of arguing a question, omitted to be raised at the last hearing, upon the following clause in the testator's will: — "I do hereby direct that they (the executors) do apply the dividends arising from the property belonging to me, which may remain after paying the different legacies, and setting apart a sufficient sum for the payment of the annuities hereinbefore bequeathed, with my funeral expenses, my debts being all paid, to the maintenance, education, and benefit of the said child (*Robert Shawe*), as they shall judge most advantageous for him; and in the event of his death before his reaching the age of twenty-one years, &c.

A testator directed his executors to apply the dividends of the property belonging to him, which might remain after paying legacies and providing for the payment of annuities, with his funeral expenses (his debts being all paid), to the maintenance, education, and benefit of *R. S.*, as they should judge most advantageous for him; and in the event of the death of *R. S.* under twenty-one, he directed the dividends to be applied as therein mentioned. *R. S.* survived the testator about two years, and the executors applied a part of the dividends to his maintenance, education, and benefit: Held, that the unapplied part of the dividends, with the accumulations, formed part of the residue.

Robert Shawe, the son of *Peter Shawe*, in the will named, lived from the 11th of *April* 1812, the time of the

(*a*) *suprà*, p. 276.

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the testator's death, until the month of *August* 1814, when he died at the age of nine years. The executors during that period applied the sum of 185*l.* to his maintenance and education; and the question was, whether his personal representative was entitled to the whole of the dividends arising from the residue of the testator's property from the 11th of *April* 1812 till *August* 1814, and the lawful accumulations upon that part of the dividends, which had not been applied to the infant's maintenance and education; or whether the unapplied dividends and accumulations fell into the residue, and belonged to the persons declared entitled thereto, according to the decision at the hearing on further directions.

Mr. *Stuart*, for the Plaintiffs, the residuary legatees, contended that, as the *corpus* of the property was not given to *Robert Shawe*, except in the event of a contingency which had not happened, so also there was no absolute gift to him of the dividends during his minority, but only a gift of such part of the dividends as the executors should, in their discretion, think fit to apply to his maintenance, education, and benefit. The personal representative of the infant would, perhaps, rely on the word "benefit;" but that expression was qualified by the following words: "as they shall judge most advantageous for him." Words attempting to limit the mode in which a gift was to be enjoyed, without a gift over, would not affect the absolute nature of the interest. But in this case a discretion was expressly given to the trustees to qualify the amount and application of the gift of the dividends; and all that was not applied in the exercise of that discretion, formed part of the residue. If the Court should be of opinion, that *Robert Shawe* was entitled, during his life, to the whole of the income of the residue from some period, a question would arise, — whether he

he was entitled to it from the death of the testator, or from the end of a year after the death of the testator. This subject was much discussed in *Douglas* v. *Congreve* (*a*), where all the authorities were examined in the judgment. In this case, the testator gave no part of the residue for the benefit of *Robert Shawe*, until after the payment of his debts, and a sufficient sum had been set apart for the satisfaction of his legacies; and it was settled that a year was the time allowed to the executor for that purpose: *Sitwell* v. *Bernard* (*b*), *Vickers* v. *Scott.* (*c*)

Mr. *Mylne*, for Defendants in the same interest as the Plaintiffs.

Mr. *Tinney* and Mr. *Romilly*, for the next of kin.

Mr. *Koe*, for the personal representative of *Robert Shawe*, said it had been argued at the hearing, and the argument was capable of being sustained, that *Robert Shawe* took a vested interest in the capital of the residue, subject to be devested, if he died under the age of twenty-one. The vesting of a legacy was not prevented, by a provision in case of the death of the legatee under twenty-one: *Deane* v. *Test.* (*d*) But whether *Robert Shawe*'s interest in the capital was vested, or contingent, he certainly took an immediate vested interest in the dividends, and his personal representative was consequently entitled to the portion of them which had not been applied by the executors, and also to the lawful accumulations. The dividends were not only given for *Robert Shawe*'s maintenance and education, but for his benefit, — a word which had always been held sufficient to

(*a*) 1 *Keen*, 410.
(*b*) 6 *Ves.* 520.
(*c*) 3 *Mylne & Keen*, 500.
(*d*) 9 *Ves.* 146.

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to carry the absolute interest. It was absurd to suppose that the testator could have intended, that the dividends should not be applied to the maintenance and education of the infant until a year after his decease. In *Sitwell* v. *Bernard*, there was an express direction for the accumulation of the interest; and the Court put a stop to the accumulation at the end of a year. Lord *Eldon*, referring to that case in *Hewitt* v. *Morris* (*a*), observed that it had been much misunderstood.

Mr. *Spurrier*, for the executors of the testator.

The MASTER *of the* ROLLS was of opinion that, upon the true construction of this will, *Robert Shawe* was not entitled, to more than such portion of the dividends as had actually been applied by the executors to his maintenance, education, and benefit; and that so much of the dividends as had not been so applied, together with the lawful accumulations, constituted part of the residue.

(*a*) 1 *Turn. & Russ.* 241.

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1837.
May 24.

An agreement was entered into for the sale of a ship to *A.* and *B.*, (one third share to *A.* and two thirds to *B.*), at the price of 750*l.*; and, if default should be made by the purchasers, for the resale of the ship the deficiency, if any, upon the resale, to be made good by the defaulting purchasers. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from *A.*, and two bills of exchange, drawn by the vendors, and accepted by *A.*, for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase-money for the one third share and two third shares of the ship was expressed to have been paid by *A.* and *B.* respectively. The acceptances of *A.* were dishonoured, and he became bankrupt.

On a bill filed by the vendors, who had become entitled to the whole interest in the purchase-money, against *B.*, who had become the sole owner of the ship by purchase from *A.*'s assignee, praying specific performance of the agreement, and payment of the unpaid purchase-money by *B.*, or that the ship might be sold, and the proceeds applied in payment, the Court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase-money by *B.*, or a resale of the ship, in default of payment in a limited time.

THE Plaintiff *John Lynn*, his son *James Lynn*, and the Defendant *Cornforth*, were the joint owners of a ship called the *Friends*, the share of *Cornforth* being mortgaged for more than its value to the Plaintiff. They were desirous of selling the ship, and employed *William Willins* as their agent for that purpose.

William Willins, as agent for the Plaintiff, agreed to sell; and *John Wright*, acting for himself, and also on behalf of the Defendant *Chaters*, agreed to purchase the ship for the sum of 750*l.*; one third to be paid immediately in cash, one third in three months, and the remaining third in six months. It was understood that *Wright* and *Chaters* did not purchase in equal shares, but *Wright* was to have one third, and *Chaters* two thirds; and it was agreed, that if any default should be made by the purchasers, the money paid in part should be forfeited to the use of the sellers, who were to be at liberty to sell the ship again; and if, upon the resale, there should be any deficiency, the same was to be made good by the defaulting purchasers.

On the 16th of *August* 1833, the parties met to complete the purchase; and the three bills of sale were executed.

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ecuted. The first related to the share of the Defendant *Cornforth;* the substantial interest was disposed of by the two other bills of sale; by one of which the Plaintiff *John Lynn* and his son, assigned two third shares, of the ship to *Chaters*, in consideration of 492*l.* 3*s.* 9*d.*, expressed to be paid by him; and by the others of which they assigned the remaining third share of the ship to *Wright*, in consideration of 257*l.* 16*s.* 3*d.*, expressed to be paid by him. All that was in fact then paid, was a sum of 250*l.*, which was paid by *Wright* by a cheque on his bankers: but *Wright* accepted two bills for 250*l.* each, drawn upon him by the Plaintiff and his son, one payable in three and the other in six months. Upon this payment, and the delivery of these acceptances, the possession of the ship was delivered to the purchasers.

James Lynn the son, died on the same day on which the bills of sale were executed, and the Plaintiff took out administration to his estate.

The two bills were dishonoured when presented for payment, and *Wright* became bankrupt.

Payment being demanded from *Chaters*, he refused; and, on an action being brought against him, he pleaded that, by the execution of the bill of sale, wherein the sum of 492*l.* 3*s.* 9*d.* was expressed to be paid, the Plaintiff was precluded from alleging that the Defendant *Chaters* had not paid for his shares of the ship. The Plaintiff, being advised that this plea was good, abandoned his action, and filed this bill, which prayed, that the Defendant *Chaters* might be decreed specifically to perform the agreement, and pay the amount of the two bills; or that the ship, of which (by purchase from the assignees of *Wright*) the Defendant had become the sole

sole owner, might be sold, and the proceeds applied in payment.

Two objections were raised, on the part of the Defendant *Chaters*, to the relief sought by the bill: first, that the Court had no jurisdiction; secondly, that the intention of the parties to the agreement was, that the Plaintiff and his son should take the bills of exchange accepted by *Wright* in satisfaction of the part of the purchase-money for which they were given as a security, in exoneration of the Defendant *Chaters*. In support of the first objection, it was said that it was doubtful whether a bill for the specific performance of an agreement for the sale of a ship, was such a bill as could be entertained at all by a court of equity. The Court could not decree specific performance of a contract for a chattel. Circumstances of fraud might bring the case within the jurisdiction of the Court, notwithstanding the nature of the contract; but here no fraud was alleged. When the possession of the ship was parted with, and the Plaintiff received payment, partly in cash and partly in bills of exchange accepted by *Wright*, the Plaintiff's claim in respect of the bills of exchange became a mere pecuniary demand, which lay altogether at law. This was an attempt to convert the subject of an action at law, over which the Court had no jurisdiction, into the subject of a suit in equity.

On the other side, it was contended that the Plaintiff had commenced an action against *Chaters* to recover the sum of 492*l.* 3*s.* 9*d.*, his share of the purchase-money; and that he had been advised to abandon it upon the Defendant pleading the Plaintiff's execution of the bill of sale, by which the money was expressed to have been paid by *Chaters*. That circumstance alone, was sufficient to give the Court jurisdiction, even if there were any

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any doubt as to the subject of the contract being the proper subject of a suit for specific performance. (*a*)

Mr. *Swanston*, for the Defendant *Chaters*.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Paynter*, *contrà*.

The MASTER *of the* ROLLS (after stating the facts).

On behalf of the Defendant *Chaters*, it was alleged that the Court had no jurisdiction to give relief in such a case; but considering that the money, the receipt of which was acknowledged, was in point of fact, not paid; that the Defendant has availed himself of that acknowledgment to defeat the Plaintiff's claim; that by this defence the Plaintiff was compelled either to submit to the abandonment of his just claim altogether, or come here, at the least, for discovery; and that there is an agreement which gives the Plaintiff a right to sell the ship if the purchase-money were not paid; I am of opinion that this Court has jurisdiction to give relief if a proper case be made out.

The Defendant *Chaters*, indeed, alleges that the Plaintiff has been paid for the ship, by payment of 250*l.* in money, and the delivery of two bills of exchange, accepted by *Wright*, for 250*l.* each: but the delivery of bills of exchange is not payment in satisfaction of the debt, whatever the effect may be until failure of payment after the bills become due. But then he alleges, that by the agreement, he was not to be liable to pay the bills; and if this be so, this bill must be dismissed, for its sole purpose is to obtain, as against *Chaters*, payment of the money due on the bills.

He

(*a*) See *Brewster* v. *Clarke*, 2 *Mer.* 75.

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He says that he had money in *Wright*'s hands, to be applied in the purchase of a ship; that this was known to the vendors, who agreed to give *Wright* some time for payment, allowing him to retain the Defendant's money in his hands in the mean time; and it was in consequence agreed, that the bills taken in payment should be the bills of *Wright* alone, and that he, *Chaters*, was to have nothing to do with the payment of them, or of the amount thereby secured. The statement is not in itself probable: but the bills were accepted by *Wright* alone, and that fact affords at least some countenance to the Defendant's statement. *William Willins* was the agent of the vendors; and it seems that *Chaters* was desirous not to be a party to the bills which were to be given; for on the 16th of *August* 1833, he requested *Willins* to use his influence with the Plaintiff, and his son *James*, to induce them to take the bills of *Wright* alone, for securing the unpaid purchase-money. To this *Willins* objected, saying it would not be regular; and he afterwards informed *James Lynn*, the Plaintiff's son, of this proposal, and advised him not to accept it, but to get *Chaters* to draw on *Wright*, which *James Lynn* said he would do. Under what circumstances *James Lynn* afterwards, on the same day, took the bills of *Wright* alone, does not appear: he died suddenly of the cholera on that day.

But the evidence of *Willins* is distinct, that in arranging the payment, he proposed to *Wright* that the bills should be drawn upon him by *Chaters;* that *Wright* agreed to that, and said, "Certainly, it is the proper way;" and from his evidence I collect that he thought that arrangement had been carried into effect. *Wright*, who has been examined for both parties, distinctly says, in his deposition for the Plaintiff, that there was no agreement between him and the agent for the vendors and *Chaters*,

or

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or between *Chaters* and him, that the purchase-money should be paid or secured by his bills alone, in exoneration of *Chaters*. And *Willins*, in his examination for the Defendant, states that he never, before the 16th of *August* 1833, heard or understood from *Chaters* and *Wright*, or either of them, that *Chaters* would have nothing to do with the bills, or that *Chaters* had money in *Wright*'s hands, to pay for *Chaters*'s shares of the ship. *Wright* also, in his examination for the Defendant, says distinctly, that it was not part of the agreement that *Chaters* was not to be a party to the bills.

The simple fact, therefore, in support of the Defendant's case is, that *James Lynn* took bills which were drawn upon and accepted by *Wright* & Co., the firm under which *Wright* carried on business, and in which *Chaters* had no concern.

James Lynn died on the same day on which this transaction took place; and *Willins* says he does not believe that *James Lynn* knew what he was about on that day. Upon that part of the evidence I place no reliance; but upon the evidence strictly applicable to the subject, and seeing that the reasons assigned by *Chaters*, for the acceptance of the bills, by *Wright* alone, are disproved, I am of opinion, that *Chaters* remained liable for the payment of the unpaid purchase-money, notwithstanding the form of the bills given for the amount.

Decree therefore an account and payment, and declare that the Plaintiff has a right to have the ship sold in default of payment by a limited time.

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March 8.
May 24.

THE bill was filed for the purpose of establishing the right of *Ann Hall* to dower, out of the estate of her first husband, *Robert Newby*, by persons claiming under the assignment of *John Hall*, the second husband of *Ann Hall*, against *Ellen Newby Meredith*, and other persons claiming under the will of *Robert Newby*, and against *John Hall* and *Ann*, his wife.

An assignment of "all and singular the legacies, debts, moneys, estate, and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which *J. H.*, in right of his wife or otherwise, was possessed," will not pass a claim of the assignor's wife to dower out of the estates of her former husband.

The bill stated, that *Robert Newby*, late of the island of *Jamaica*, deceased, at the respective times of his marriage with the Defendant, *Ann Hall*, and of making his will, and thenceforth to the time of his death was legally seised or entitled, for an estate of inheritance in fee simple in possession, of or to divers messuages or tenements, lands and hereditaments, situate in the parish of *Cartmell*, or elsewhere in the county of *Lancaster*, and particularly of an estate called *Green Farm;* and, being so seised or entitled, he made his will in such manner as by law is required for rendering valid devises of freehold estates, dated the 29th day of *May* 1818; and he thereby, after directing that all his just debts and funeral expenses, and the several legacies and bequests thereinafter given, should be paid by his executors out of his estate, gave to his wife, the Defendant, *Ann Newby*, the sum of 5000*l.* current money of *Jamaica*, and certain household furniture, and directed that his wife should have the use of his house at *Richmond Hill* as a residence, with such coveniences and allowances as his executors might in their discretion think fit, during such time only as she should remain his widow; and he thereby also devised to his brother, *James Newby*, during his life, all his said messuages

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messuages or tenements, lands and hereditaments, commonly called *Green Farm*, and after the death of *James Newby*, to revert back and become part of the residue of his estate. And the testator devised and bequeathed all the residue and remainder of his estate, real and personal, whatsoever and wheresoever, to his children to be begotten on the body of his said wife, share and share alike, to them and the heirs of their body lawfully begotten, for ever; but in case of the death of all his children without lawful heirs, then the testator devised the same unto and among the children of his sister *Jane Meredith*, share and share alike; and in case of the death of all his said nephews and nieces without lawful issue, then to be divided among the children of his brothers *Thomas* and *John Newby*, share and share alike, to them, their heirs and assigns, for ever. And the testator appointed *James Newby* and *Hamilton Brown*, *Isaac Higgin* and *Alexander Young*, of the island of *Jamaica*, executors of his will.

The bill then, stated that the testator afterwards made a codicil to his will, dated the 2d of *January* 1819, whereby he revoked the appointment of *Alexander Young* as one of the executors of his will; and the testator thereby directed, that in addition to the other bequests given to his wife by his will, she should have the use of *Richmond Hill House* as a residence, with six acres of land round the house, for her life. And the testator thereby also directed his executors to lay out, as soon after his decease as possible, the sum of 1500*l.* in the purchase of a house and land in the county of *Lancaster*, to be for the sole use and benefit of his wife.

The bill proceeded to state, that the testator died in *Jamaica*, in the month of *September* 1820, leaving his wife

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wife *Ann Newby* surviving him, and that his will was duly proved in *Jamaica* by *Hamilton Brown*, attorney, but that no probate was ever taken out in this country. That *Robert Newby* never had any children by his wife *Ann Newby*. That, after the death of *Robert Newby*, *James Newby*, the devisee for life named in the will, entered into possession or receipt of the rents and profits of the estate called *Green Farm*, and continued in such possession or receipt until his death.

The bill then stated that, in the year 1821, a marriage was solemnised between *Ann Newby*, the widow, and the Defendant *John Hall*. That no settlement or provision in lieu or bar of dower having been made for the benefit of *Ann Hall*, on or previously to the marriage with her first husband, *Robert Newby*, she became entitled, upon his death, to dower out of all the freehold estates of which he was seised, or to which he was entitled for an estate of inheritance in possession, at the time of his death, or during his marriage with *Ann Hall*, and particularly out of the estate called *Green Farm*. That no settlement of the said dower having been made on or before the second marriage of *Ann Hall*, the Defendant *John Hall* thereupon became absolutely entitled thereto during the joint lives of himself and *Ann Hall* by virtue of his marital right; and that being so entitled, *John Hall* duly executed an indenture dated 15th of *March* 1834, and made between *John Hall*, of the first part; the Plaintiffs to this cause, of the second part; and certain persons mentioned to be creditors of *John Hall*, and to be named in a schedule to the deed, of the third part; whereby *John Hall* assigned to the Plaintiffs all and singular the legacies, debts, moneys, estate, and effects whatsoever and wheresoever, and of what nature and kind soever, which *John Hall*, in right of his wife or otherwise, was possessed of, as well

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well under the will and codicil of *Robert Newby*, as in any other manner, on certain trusts for the benefit of the creditors of *John Hall*, with an ultimate trust for the benefit of *John Hall*.

To this bill the Defendants, who claimed under the will of *John Newby*, put in a general demurrer for want of equity.

Mr. *Pemberton* and Mr. *Loftus Wigram*, in support of the demurrer, contended first, that upon the true construction of the testator's will, the widow was put to her election; and they cited *Miall* v. *Brain* (*a*) and *Butcher* v. *Kemp*. (*b*) Wherever it could be collected from the whole will, that the intention of the testator would be disappointed, if the widow insisted upon her legal right to dower, the Court would hold, that it was the intention of the testator to put her to her election. Secondly, they contended, that even if the wife's right to dower remained unaffected by the will, it did not pass under the deed executed by the Defendant *John Hall*. The widow's right to have her dower set out could not be made the subject of legal assignment by an after-taken husband. The deed purported to assign "all and singular the legacies, debts, moneys, estate, and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which *John Hall*, in right of his wife or otherwise, was possessed." The word "estate" could not pass a mere right to dower not assigned to the widow, which was not an estate; nor could it indeed, connected, as it here was, with other expressions applicable only to personal estate, pass any interest in land. In *Wilkinson* v. *Merryland* (*c*), the testator

(*a*) 4 *Mad.* 119.
(*b*) 5 *Mad.* 61.
(*c*) *Cro. Car.* 447.

testator devised "all the rest of his goods, chattels, leases, estates, mortgage, debts, ready money, plate, and other goods whereof he was possessed, to his wife;" and it was held that no fee passed to her.

Mr. *Kindersley* and Mr. *Palmer*, *contrà*, insisted that there was nothing in this testator's will to raise a case of election against the wife's right to dower, and they cited *Lawrence* v. *Lawrence* (*a*), *Lemon* v. *Lemon* (*b*), *Lord Dorchester* v. *The Earl of Effingham* (*c*), and *Birmingham* v. *Kirwan*. (*d*) As to the second objection, the wife's right to dower was clearly an interest which the husband, in equity at least, was capable of assigning. It was not necessary that a mere right should be clothed with the legal title, to enable a party interested in that right to sue in a court of equity. A strong illustration of that principle was afforded by the case of *Alexander* v. *The Duke of Wellington* (*e*), where it was held, that a military prize was capable of being effectually assigned by the captor, before any interest had been vested in him by a grant from the Crown. The language of the deed, was sufficient to pass the husband's interest in his wife's right to dower. There was no ground for contending that the word "estate" would not pass a right to recover dower; even the word "debts" was sufficient to carry the arrears of dower to which the widow was entitled. All that *Wilkinson* v. *Merryland* decided was, that the word "estates," when so connected with other expressions as to exclude an intention to dispose of real estate, would not pass the fee-simple in land.

Mr. *Pemberton*, in reply.

The

(*a*) 2 *Vern.* 365.; *S. C. Freem.* 234.; 1 *Eq. Ca. Abr.* 218.; 2 *Eq. Ca. Abr.* 386.; and 1 *Rop. Husb. & W.* 577.

(*b*) 8 *Vin.* 366. pl. 45.

(*c*) *Coop.* 319.

(*d*) 2 *Sch. & Lef.* 444.

(*e*) 2 *Russ. & M.* 35.

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The MASTER *of the* ROLLS.

The first question raised in the argument was, whether Mrs. *Hall*, as the widow of *Robert Newby*, was bound to elect between her right to dower, and the provisions made for her by his will and codicil. It does not appear to me that she might not have enjoyed her dower consistently with the devise contained in the will and codicil; or that the enforcement of her claim to dower would have defeated any intention clearly expressed by the testator; but on the present occasion, I do not think it necessary to determine whether she was put to her election or not, for the next question is, whether her right to dower, if existing, has been duly assigned to the Plaintiffs, and I think that it has not.

Supposing that Mrs. *Hall*, as the widow of *Robert Newby*, was entitled to dower, it was open to her before her second marriage, to pursue the proper means to establish her right, and have her dower assigned. When a woman is in possession of such portion of her deceased husband's estate as has been assigned to her for her dower, and is thereby tenant in dower, her after-taken husband may be able to deal with that estate in the same manner, and to the same extent, that he may deal with any other real estate of which his wife is tenant for life; but until the lands to be held in dower are assigned, the widow has no estate in the lands of her deceased husband. She has a right to have her dower assigned, but has no estate in the lands; and her after-taken husband, claiming only in her right, has no estate in the lands.

And supposing the widow's right to dower to be an interest which her after-taken husband could assign in equity, I think that by the deed of the 15th of *March* 1834,

1834, as stated in this bill, Mr. *Hall* has not assigned his wife's claims to dower to the Plaintiffs. The deed purports to assign " all and singular the legacies, debts, monies, estate, and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which the said *John Hall*, in right of his wife or otherwise, was possessed, as well under the will and codicil of *Robert Newby* as in any other manner howsoever." There is no recital referring to Mrs. *Hall*'s claim for dower, nor are there any words aptly or sufficiently describing it; and without saying that the right of Mrs. *Hall* might not, by proper means, have been effectually assigned in equity, I think that by this deed, describing the property to be assigned in the manner I have mentioned, Mrs. *Hall*'s right to dower, if existing, did not pass; and consequently that the Plaintiffs have no right to the relief they ask, and that the demurrer must be allowed.

Demurrer allowed.

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June 12.

A bill was filed by residuary legatees against the executor and the surviving partner of the testator, for an account of the partnership transactions. It charged that an unfair valuation of the partnership stock had been made by a clerk of the surviving partner; and that there was no settled account between the Defendant, or that, if any, the same was fraudulent and collusive. The Defendant, the surviving partner, pleaded a settled account with the executor to the whole bill, except such parts thereof as were comprised in his answer in support of the plea, and by which he denied any fraud or collusion whatever. Held, first, that the plea, being to part of the relief and part of the discovery, instead of to the whole of the relief and part of the discovery, was irregular in point of form, but leave was given to amend; secondly, that the Defendant was not bound to set forth the settled account, or to aver that he had delivered up the vouchers to the executor; and lastly, that though the charge of an unfair valuation of the partnership stock was not expressly denied by the answer, the plea did not, therefore, cover too much, as such a valuation might have been admitted consistently with a just final account.

The case of *Bowsher* v. *Watkins* does not establish the general proposition, that in every case a bill may be filed against any executor and the surviving partner of the testator, without charging and proving fraud or collusion between them.

THE bill was filed by two of the persons beneficially entitled to the residue of the estate of the testator, *William Davies*, who had carried on the business of a ship-builder in co-partnership with the Defendant *John Buckle*, against *Joseph Davies*, the executor under the will, and *John Buckle*, the surviving partner of the testator. It prayed for an account of the partnership transactions between the deceased testator and *John Buckle*, and that the balance due to the estate of the testator might be ascertained. The bill charged, that a pretended valuation had been made of the partnership stock after the decease of the testator, by a clerk of the Defendant *John Buckle*, and that the same was not a fair valuation; that no account had been settled between the Defendants in respect of the partnership transactions, or, that if there was any pretended settled account, the same was fraudulent and collusive; and it prayed a discovery in respect of such pretended settled account. It further charged that the documents and vouchers relating to the partnership transactions were in the possession of the Defendants, and that they refused to permit the same to be inspected. To this bill the Defendant, *John Buckle*, put in a plea and answer, whereby

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whereby he pleaded to the whole bill, except such parts thereof as charged that, if there had been any pretended settled account, the same was fraudulent and collusive; and averred that a final account had been settled between him, the Defendant *John Buckle*, and the Defendant *Joseph Davies*, in respect of the partnership transactions, on the 31st of *December* 1832, upon which account a balance of 2551*l.* 8*s.* 4*d.* was due to him the Defendant *Buckle*, which balance was paid to him on the 17th of *May* 1833, when he signed a receipt for the amount to the Defendant *Joseph Davies*. To the parts of the bill excepted from the plea, the Defendant answered by denying any fraud or collusion whatsoever.

Mr. *Pemberton* and Mr. *Stinton*, in support of the plea.

Mr. *Cooper* and Mr. *Spurrier*, *contrà*.

There are three grounds of objection to this plea and answer. First, wherever it appears that the Plaintiff is not in possession of an account, or a copy of it, and the Defendant pleads a settled account, he must annex a copy of the alleged account to his answer. *Hankey* v. *Simpson*. (*a*)

In this case no such copy is annexed to the plea and answer. The Plaintiffs were not parties to the account, and they have no means of judging of the fairness of the pretended stated account, unless it is set forth by the Defendant. The next objection is, that it is not averred by the plea that the vouchers were delivered up by the Defendant *Buckle* to the executor, and if not, the Plaintiffs ought to have access to them. It has been determined that a plea of a settled account and release to

(*a*) 3 *Atk.* 303.

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to inquiries as to the execution of a trust, does not extend to the discovery of vouchers: *Clarke* v. *The Earl of Ormonde* (*a*). A third objection to the plea is, that it covers too much. The bill contains a special charge that a fraudulent valuation of the partnership stock was made by *Judge*, a clerk of the Defendant *Buckle*; that charge is not denied by the answer, and, if covered by the plea, must be taken to be true: *Roche* v. *Morgell.* (*b*) A general denial of fraud by the answer is not sufficient, since a particular charge must be met by a specific denial: *Radford* v. *Wilson.* (*c*) In a bill filed by residuary legatees for an account against an executor and surviving partner of the testator, it is not necessary, in the first place, to charge collusion, as it would be in order to sustain a bill against an executor and any other debtor to the testator's estate; and, if collusion be charged, as it is in the present case, the charge need not be substantiated: *Bowsher* v. *Watkins.* (*d*) The plea is moreover bad in point of form; it ought to have been a plea to the whole of the relief and to a part of the discovery; but, taking no distinction between relief and discovery, it is a plea to the whole of the bill, except certain parts of it which charges, that if there were any pretended settled account, the same was fraudulent. The answer is not confined to any particular matters charged in the bill, but contains a general denial of fraud; and, as there is no assignable separation of the matter which is the subject of the plea and of the answer, the answer overrules the plea: *Lord Portarlington* v. *Soulby.* (*e*) Either the alleged unfairness in the valuation of the partnership stock is included in the general denial of fraud by the answer, or it is not. If it is included, the plea and answer are to the same

(*a*) *Jac.* 116.
(*b*) 2 *Scho. & Lef.* 727.
(*c*) 3 *Atk.* 815.
(*d*) 1 *Russ. & Mylne*, 277.
(*e*) 6 *Sim.* 356.

same matter, and the answer over-rules the plea; if it is not included in the answer, the plea covers too much by admitting the alleged unfairness of the valuation.

Mr. *Pemberton*, in reply.

The objection to the form of the plea is a mere verbal objection. It is said that the Defendant ought to have pleaded to the whole of the relief and to all the discovery, except so much of it as is met by the answer, whereas he had pleaded to the whole of the bill, that is, to the whole of the relief and discovery, except so much of the bill as seeks relief or discovery, which is met by the answer. The plea is, at any rate, substantially good; and if no other objection to it can be sustained, the Court will permit it to be amended. As to the first objection, Lord *Hardwicke*, in the case cited, says "it is not necessary in every case that the account should be annexed by way of schedule to the answer, for the plea is sufficient in case it be a fair account between the parties." In that case, the Plaintiff was a party to the account, and expressly charged in his bill that he had no counterpart; here there is no such charge in the bill, nor were the Plaintiffs entitled to the possession of a counterpart. As to the vouchers, they were of course delivered up to the executors upon the settlement of the account, and the right of the Plaintiffs to call for the inspection of them, if any right existed, would be against the executor and not against the Defendant *Buckle*. The plea of a settled account by a party dealing with an executor, implies the delivery of vouchers to the executor who was entitled to receive them, and it is not necessary to aver such delivery. In *Clarke* v. *Lord Ormonde*, the plea of a settled account and release, was by the trustee against the *cestui que trust*. The case of *Bowsher* v. *Watkins* is open to much observation, and the ground upon which Sir *John Leach* determined

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determined it, does not appear in the decision; but there was a circumstance in that case, which may account for the judgment, and which is wanting in the present case, and that is, that there were specific assets in the hands of the surviving partner, liable to the claim of the *cestui que trust*. As to the objection that the plea covers too much, that is founded upon the assumption that the plea admits an unfair valuation, and that such valuation forms an ingredient in the settled account. The answer to this is, first, that the charge of an unfair valuation, is sufficiently rebutted by the answer, which denies all fraud and collusion; and secondly, that if an unfair valuation is included in, and according to the strict rule of pleading, admitted by the plea, the effect of the plea and answer is to aver, that such unfair valuation was rejected from the final account.

The MASTER *of the* ROLLS.

This plea is substantially a plea to the whole of the relief sought by the bill, though it is defective in point of form, according to the decision in *Lord Portarlington* v. *Soulby*, being a plea to the whole of the bill, except that part of it which is met by the answer, whereas it ought to have been a plea to the whole of the relief, and all the discovery except what is stated by he answer. As this is a mere slip in point of form, the Defendant will be at liberty to amend his plea, if, in other respects, the plea can be sustained, and I am of opinion that it can. Three objections have been taken on the part of the Plaintiffs; first, that no copy of the account is annexed to the plea and answer; secondly, that there is no averment that the vouchers were delivered up by the Defendant to the executor; and thirdly, that the plea covers matter, which must be taken to be true, and, if true, will render the defence unavailable

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unavailable for want of equity. It has been said, in the course of the argument, that in a suit constituted as this is, against the executor and surviving partner of the testator, for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which are charged in the bill, and the case of *Bowsher* v. *Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir *John Leach* to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case, a bill might be filed against an executor and surviving partner of the testator, without charging and proving fraud or collusion. In this case there are no special circumstances; it is a bill filed by persons beneficially interested in the testator's estate, against the executor and the surviving partner, and it seeks to have the partnership accounts now. The Defendant, the surviving partner, by his plea avers, that an account was settled with the executor on the 31st of *December* 1832, and that, if unimpeached, is a sufficient defence to the bill. It is said that the Defendant ought to have set forth the settled account; but that is not, generally, necessary; a bill may be so framed as to render it incumbent upon a Defendant to set forth a settled account, but it does not appear to me that this bill is so framed. There is no distinct allegation in the bill, that the Plaintiffs are unable to obtain an inspection of the account or of the vouchers, or that they have been applied for in the proper quarter. The only point as to which I have felt any difficulty, is the charge of an unfair valuation having been made by the clerk of the Defendant *Buckle*. That charge is not specifically answered, and must, therefore, be taken to be admitted by the plea. But I do not find any thing in the bill that necessarily connects this charge with the settlement of the account; it is

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is not alleged that the final account was taken upon the footing of the unfair valuation; and as no relief is prayed, beyond the taking of the partnership accounts, and the fact of an improper valuation having been made, is not inconsistent with a final account which is unimpeachable, I think this plea and answer must be allowed, subject to the amendment of the irregularity in point of form.

The Plaintiffs applied for and obtained leave to amend their bill within ten days, waiving the irregularity in the form of the plea which was to stand good, if the bill were not amended within the limited time.

The Plaintiffs did not amend their bill, but after the expiration of the limited time filed a replication to the answers only of the Defendants but not to the plea.

Jan. 18.

A motion was afterwards made on the part of the Defendant *Buckle*, that the costs of the suit might be paid by the Plaintiffs; and, in support of that motion, it was said that under the thirty-first of the new orders of 1828 (*a*), upon the allowance of the plea, which in this case, was substantially a plea to the whole bill, the Defendant would have been entitled to the taxed costs of the suit, unless the Plaintiffs had undertaken to reply to the plea. Instead of undertaking to reply to the plea, the Plaintiffs then obtained leave to amend their bill within a limited time, which they had suffered to elapse without taking advantage of the indulgence thus given them by the Court. They were now therefore in the same situation as if they had declined filing a replication to the plea at the hearing, and were subject, therefore, to the provisions of the thirty-first order. The general replication

(*a*) 2 *Russ. Appendix*, 12.

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replication as it applied to the answer of the Defendant *Buckle* raised no issue, as that was a mere answer in support of the plea denying fraud and collusion. *Griffiths* v. *Wood*, 1 *V. & B.* 307., was cited.

For the Plaintiffs it was insisted, that the replication to the answer of the Defendant *Buckle* raised the material issue in the cause, namely, whether the account was or was not a fair one; and that the allowance of the plea, even if the Plaintiffs were now precluded from replying to it, by no means involved the costs of the suit. That the allowance of a plea did not, like the allowance of a demurrer, put the cause out of court, and the Plaintiffs were still at liberty to file a replication to the plea.

The Master of the Rolls ordered that the Plaintiffs should, upon payment of the costs of this application, be at liberty to file a replication to the plea within a week; and, if they did not, that the costs of the suit should be paid by the Plaintiffs to the Defendant. (*a*)

(*a*) The order was afterwards affirmed by the Lord Chancellor.

The ATTORNEY-GENERAL *v.* JACKSON.

May 1.
June 3.

A testator, by his will dated in the year 1556, devised lands upon condition, that with the rest of the premises, the trustees therein mentioned should cause a free-school to be kept in the village of *H.* for evermore, to the intent that the children, that should be there brought up, should pray for the testator's soul, and for all Christian souls.

Held, that the words "free-school," ought not to be construed as if they were "free grammar-school," and that the rents and profits of the devised estates were applicable to all elementary instruction.

THIS information was filed by the Attorney-General at the relation of *John Bradley*, against the trustees in whom were vested certain estates, given by several testators

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testators for the endowment of a school for the benefit of the inhabitants of *Hampton* parish, and other charitable purposes, and its object was to obtain the directions of the Court for the better management and regulation of the charitable foundations in question, and the better application of the trust estates. One of the questions raised in the cause was whether under a devise upon condition that with the rent of the premises, the vicar, churchwardens, and parishioners of the parish of *Hampton* should cause a free-school to be kept in the said village for evermore, to the intent that the children that should be there brought up, should pray for the testator's soul, and for all Christians, the word "free-school," could be construed in any other sense than that of "free grammar-school;" and, if not, whether the instruction to be given to the children could be extended to other branches of elementary learning besides instruction in the learned languages.

On the one side the case of *The Attorney-General* v. *Whitely* (*a*) was cited, where the free-school at *Leeds* was held to be a free grammar-school, for teaching grammatically the learned languages, and Lord *Eldon* held, that the Court had no power to permit the funds of the charity to be applied to procuring the means of instruction in any other branch of learning. That decision was followed by Sir *Thomas Plumer*, in *The Attorney-General* v. *The Dean and Canons of Christ-Church* (*b*) who observed that in *The Attorney-General* v. *Whiteley* it was much pressed upon the Lord Chancellor, and it would have been very desirable, that part of the funds should have been employed on another object more fit for the inhabitants of a commercial town; but it was not in the power of the Lord Chancellor to order it, and introduce

(*a*) 11 *Ves.* 241. (*b*) *Jac.* 484.

duce any thing not according to the nature of the foundation. The subject was again considered by Lord *Eldon* in *The Attorney-General* v. *The Earl of Mansfield* (*a*), and he adhered to the same opinion. It was true that the principle laid down by Lord *Eldon* had been departed from in some recent cases, but it was doubtful whether, in those cases, the Court had not exceeded its jurisdiction. The question was not so much one of authority, as of jurisdiction.

On the other side, the cases of *The Attorney-General* v. *The Haberdashers' Company* (*b*), *The Attorney-General* v. *Dixie* (*c*), and *The Attorney-General* v. *Gascoigne* (*d*), were relied upon; and it was argued that the words "free-school" were distinguishable from "free grammar-school," and that even if the latter words, notwithstanding the recent authorities, were to be confined to the sense put upon them by Lord *Eldon*, there was nothing in the language of this will to shew, that the testator meant to restrict the instruction to be given to the children, who were the objects of his bounty, to instruction in the learned language. On the contrary, the intent that they should pray for the testator's soul, and for all Christian souls, appeared to afford a sanction for the most liberal and comprehensive scheme of instruction of which the funds would admit.

Mr. *Pemberton*, Mr. *Addis*, and Mr. *Williamson*, in support of the information.

Mr. *Tinney*, Mr. *Kindersley*, Mr. *Koe*, and Mr. *O. Anderdon*, for the Defendants.

The

(*a*) 2 *Russ.* 513.
(*b*) 3 *Russ.* 530.
(*c*) *Ibid.* 534 n.
(*d*) 2 *Mylne & Keen*, 652.; and see *The Attorney-General* v. *Caius College*, 2 *Keen*, 150.

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The Attorney-General *v.* Jackson. *June* 3.

The Master *of the* Rolls.

The object of this information, is to obtain the directions of this Court for the regulation and management of a school at *Hampton*, by means of the due application of the rents and profits of certain estates, now vested in the Defendants, and also to obtain an account of the rents received by the Defendants since the death of Dr. *Hemming*, a former master of the school, and of their application thereof.

That which is generally called by the general name of *Hampton* parish, consists of two distinct districts, which are called *Hampton Town* and *Hampton Wick;* and it is said, that for most, if not all ecclesiastical purposes, these districts constituted distinct parishes.

The trust for the school comprises several endowments, all of which were made for the benefit of *Hampton* parish. The first gift was made by the will of *Robert Hammonde*, dated the 7th of *March* 1556. The testator thereby gave a tenement and an acre of land to the vicar and churchwardens of the parish church of *Hampton* and to their successors, vicars and churchwardens, and also to the parishioners of the said parish, to hold the same to the vicar, churchwardens, and parishioners of the same parish of *Hampton*, and to their successors for ever, upon condition, that with the rent of the premises, the said vicar, churchwardens, and parishioners, should cause a free-school to be kept in the said village for evermore, to the intent that the children, that there should be brought up, should pray for the testator's soul, and for all Christian souls; immediately after his decease, he willed that the said vicar and the churchwardens for the time being should take 40*s.* 8*d.*, parcel of the rent of the premises, yearly for three years then next following, and therewith should furnish

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furnish in the church-yard there, a house with seats in it for children to be taught in it; and he willed that the vicar, that then was, should have yearly of the rent of the premises, 13*s.* 4*d.* during the said three years; and, after the house should be finished, then he willed that the said vicar should have the whole rent of the said tenement and premises during his natural life, so that he would teach children freely, and repair the housing. The second gift was made by the will of *Edmund Pidgeon*, dated the 20th of *October* 1657; and thereby, he gave certain stables unto the free-school of *Hampton* for ever. The gift of *Pidgeon* is therefore, a mere accession to the gift of *Hammonde*. The proportions given by both wills now produce a rent of 73*l.* 6*s.* per annum; and upon the will of *Hammonde* it is to be observed, that he intended the school to be in the village *Hampton*, and in the church-yard there: that the children who are to have the benefit of the school, are merely described as the children that there should be brought up, without any reference whatever as to the residence and quality of their parents; and that the first schoolmaster was to be the then vicar, on condition that he should teach the children freely, and repair the housing. He calls his intended school a free-school; but except as to any inference which may be deduced from that expression, and his intent that the children should pray for his soul and all Christian souls, there is nothing in the will, to indicate what sort of instruction, the testator intended to be given to the children.

The other gifts originated in the will of *John Jones*, described to be of *Hampton-on-Thames*. This will, which is said to be in two parts, was not so executed as to pass lands; but that which is called the first part is dated the 21st of *October* 1691; and the purport of it,

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after giving a meadow and the parsonage of *Hampton* to *Richard Ward* for life, was to give the reversion of the said meadow and parsonage unto the maintenance of six aged and poor persons of *Hampton* parish, and to the maintenance of a free school there, to be apportioned as follows; namely, to each of the six poor aged men 6*l.* per annum, payable every year at *Christmas*, when also the schoolmaster was to be paid 36*l.* more, which legacies together amount to 72*l.* And then he gave the overplus of his rents at *Hampton* to *Nathaniel Lacey* and his heirs by his then wife, desiring him to use his best endeavours in the due settling and carrying on the legacies, so as to answer the good intended thereby. That, which is called the second part of the same will, but which rather appears to be a substitution for the first part, is dated the 26th of *March* 1692; and thereby the testator, after giving the meadow and parsonage to *Richard Ward* for life, expresses himself as follows: — Item, I give the reversion of the said meadow and parsonage unto the maintenance of six aged poor men who are of good life and conversation, and inhabitants of *Hampton-upon-Thames*, not exceeding the sum of 6*l.* per annum to each of the said six persons; and the remainder of the annual value of the said meadow and parsonage my will and mind is shall be paid and allowed to an honest and able schoolmaster, to be approved annually by the churchwardens of the parish, who may and must teach six poor children of the said parish to read and write, and to instruct them in the catechism, that they may know their duties both to God and man. And it appears that the testator gave the residue of his personal estate to such pious and charitable uses as his executors should think fit.

The will of *John Jones* not being so executed as to pass real estates, the devised estate descended upon *Martha*

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Martha Tarrion, his sister and heir-at-law; and she, by deed dated the 27th of *August* 1692, conveyed the meadow and parsonage (the subject of the devise) to the use of *Richard Aitkin* for life, with remainder to his right heirs; and, disputes having arisen between *Aitkin* and the executors of *John Jones*, the differences were referred to the arbitration of Sir *Richard Raines*, who awarded that, in consideration of 260*l.* to be paid to *Aitkin* by the executors, he should convey the meadow and parsonage as they should appoint; and accordingly, by indenture dated the 27th of *March* 1696, and made between *Aitkin* of the first part, the executors of *John Jones* of the second part, and the vicar of *Hampton*, together with ten other persons by name, of the third part, *Aitkin*, by the direction of the executors, conveyed the premises (except the advowson or right of patronage) to the parties of the third part, as trustees on trust, to pay 6*l.* a year to each of the six poor men to be named as therein mentioned; and on trust to pay the residue of the rents yearly to the schoolmaster for the time being of the free school in *Hampton*, or to some other person that should teach the said six poor children; namely, six poor children of the said parish, to write and read: and, after certain clauses providing for the indemnity of the trustees, it was declared that the six poor aged men and the six poor children who were to partake of the said charity, should from thenceforth for ever be annually appointed by the minister and churchwardens of the parish of *Hampton* for ever; and that, when any eight of the feoffees before named should die, the survivors should (upon the request and at the costs and charges of the minister and churchwardens and parishioners of the parish of *Hampton*) convey the estate unto such other eight persons (to the use of themselves the survivors and such other eight persons as

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aforesaid) as the minister and churchwardens of the parish at that time being should appoint.

The property comprised in this deed is said to produce a rent of 208*l.* 5*s.* per annum, after paying 6*l.* a year to each of the six poor men. And upon this deed it is to be observed, that the children who are to have the benefit of the charity are only described as six poor children of the parish, to be appointed by the minister and churchwardens; that the estate was vested in trustees, who were to pay the rents (beyond the payment of the six poor men) to the schoolmaster of the free-school in *Hampton*, or to some other person who would teach the six poor children to write and read: and it is provided that, upon the death of eight trustees, eight new trustees are to be appointed by the ministers and churchwardens, and the survivors are to make the proper conveyance; but as this conveyance is to be made at the request of the minister, churchwarden, and parishioners, it was intended to give an effectual control over the appointment or election of the new trustees to the minister, churchwardens, and parishioners.

The last endowment was conferred by a deed dated the 20th of *April* 1697, and made between the executors of *John Jones*, of the one part, and the vicar of *Hampton* and the same ten persons who were trustees under the former deed, of the second part; and thereby, after reciting the will of *John Jones*, and that his executors, having made provision for the six aged men and six poor children, were willing to make some further provision for an able schoolmaster to teach and instruct children in the *Latin* tongue; and that they had purchased the property thereby conveyed with intent to settle it for charitable uses in further performance of the will

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will of *Jones*, it was witnessed that they conveyed the property to the trustees and their heirs, on trust that the rents might be employed for or towards the maintenance of an able schoolmaster, lawfully licensed and qualified to teach and instruct children, and who should be resident and living in a convenient school or house within the town of *Hampton*, who should freely and without any other reward, and not by deputy or substitute (unless in case of sickness or unavoidable necessity), teach and instruct the children residing and living within the said town or parish of *Hampton*, the *English* and *Latin* tongues, and to understand the catechising then allowed by the church of *England*. And after reciting, that there was a free-school at *Hampton*, the master whereof was meanly provided for, it was declared, that the master of the said school should have the preference before any other person to have the benefit of the said charity and benefaction, in case he should conform and agree to perform the duty aforesaid, and should freely and personally instruct children residing and living within the parish in the *English* and *Latin* tongue, and to understand the church catechism: if the master did not conform, he was to be suspended or removed, and a new master was to be appointed by *Nathaniel Laley* in his lifetime, and after his death by the trustees. And by this deed, when any eight of the trustees should die, the survivors of them, at the request of the vicar and churchwardens, were to convey the property unto such other eight persons, to the use of themselves the survivors and such other eight persons as aforesaid, and their heirs, as the vicar and churchwardens, together with the vestrymen of the parish at that time being, should nominate and appoint.

The income produced by the property comprised in the last deeds amounted to 65*l.* per annum. The

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children who are to have the benefit, are described as children residing within the town and parish of *Hampton*, and they are to be taught the *English* and *Latin* tongues, and the catechism. The estate was vested in the same persons who were made trustees of the property comprised in the former deed, and the rents are to be applied in maintaining an able schoolmaster, who is to be resident within the town of *Hampton*, and a preference is given to the schoolmaster of the free school; and it is provided that, upon the death of eight trustees, eight new trustees are to be appointed by the vicar and churchwardens, together with the vestrymen of the parish, and the survivors are to make the proper conveyance; but the conveyance is to be made at the request of the vicar and churchwardens. The phrase is varied, but the effect of this clause, as it appears to me, is to give an effective control over the appointment or election of the trustees to the vicar, churchwardens, and parishioners. Seeing that the trustees named in the two deeds were the same persons, and that, consequently, the appointment of new trustees would become necessary at the same time, it can scarcely be supposed that the mode of election and appointment was intended to be different.

Such being the several endowments, various questions are raised in this suit respecting the mode in which the trustees and the schoolmaster ought to be appointed, the children who ought to be admitted to the benefit of the school, the sort of instruction which ought to be given there, the additional accommodation, if any, which ought to be afforded to the hamlet of *Hamptonwick*, and the mode of taking the account since the death of Dr. *Hemming*, the last regularly appointed schoolmaster. [His Lordship, after deciding, upon the construction of the wills and deeds, as to the mode in which the

the trustees and schoolmaster were to be appointed, proceeded as follows: —]

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It appears that, since the year 1787 at least, the instruction given under the several endowments has been confined to the children of parents residing and paying scot and lot within the parish of *Hampton:* I have before stated my opinion that there is no ground for excluding the children of parents who do not pay scot and lot; and in the scheme to be settled by the Master, provision must be made for giving to all children residing within the parish, a right of admission to the school, pursuant to the regulations which may be adopted with respect to their ages and numbers, and in other respects.

With respect to the sort of instruction to be given, I do not think that the words "free school," in *Hammonde*'s will, ought to be construed as if they were "free grammar-school:" I think that the founder neither intended the children to be taught grammar exclusively, nor to exclude them from instruction in any other learning. In the deed of 1697, it is expressly said, that the children are to be taught the *English* and *Latin* tongues, and the church catechism; and I am of opinion that the rents and profits of the estates devised by the wills of *Hammonde* and *Pidgeon*, and conveyed by the deed of 1697, are applicable to the instruction of children in all elementary learning, including the *Latin* language and the church catechism.

In the deed of 1696, it is provided, that only six children be taught to read and write; and there is no ground for argument, that the revenue is to be applied in maintaining a grammar-school.

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A question, which was much discussed at the hearing of the cause, was, whether the Court had authority to order a branch school to be established, or a school-room belonging to this school to be built at *Hampton-wick*, for the more convenient instruction of the children residing there. Now by the will of *Hammonde*, it is directed that the free school shall be kept in the village of *Hampton*, and the building, which the testator contemplated, was to be finished in the churchyard; and, by the deed of 1697, it is directed that the schoolmaster shall be resident in a convenient school or house within the town of *Hampton;* and I therefore think that no part of the revenue arising from the gifts of *Hammonde* and *Pidgeon*, and the second gift of *Jones*'s executors, ought to be applied in maintaining a school-room or schoolmaster at *Hamptonwick*, or any where else in *Hampton* town; but of the children to be educated under the deed of 1696, it is only said, that they are to be six poor children of the parish, to be annually appointed by the minister and churchwardens; and of the schoolmaster, it is only said, that he is to be schoolmaster of the free school, or some other person; and, if he should be some other person, there is nothing to restrict his residence to any particular part of the parish.

Now, supposing the several endowments to continue to be united as they have hitherto been, the revenue for a school of merely elementary instruction is of large amount, being altogether 346*l.* a year. It may be hoped that the children to be instructed for this sum will be more than can be conveniently taught in one room or school; and if an additional room is to be provided, there seems to be no sufficient reason why a part of the income arising from the first gift of *Jones*'s executors should not be applied in maintaining a schoolmaster and school-room in any part of the parish which may be most

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most convenient, or which may tend most to render the charity efficient. I therefore think that, if it should appear to be beneficial, a school-room in connection with this school might be provided at *Hamptonwick;* but I have not before me any evidence sufficient to enable me to determine whether it would be beneficial or not, and I cannot determine the question without a reference to the Master.

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HOARE *v.* CAMPBELL.

April 30. 1838.

In an inquiry in the Master's office, the parties proceeded by affidavit: Held, that the Plaintiff could not use the answer of one Defendant, by way of an affidavit, as evidence against a Co-defendant.

THIS case came before the Court on exceptions to the Master's report. It appeared that, Mr. *Campbell* and Mr. *Macqueen*, were originally Co-defendants; but after the latter had put in his answer, the bill was dismissed as against him. At the hearing, the Master was directed to take an account of the rents and profits of the estate in question received by *Campbell*, and to make him allowances for necessary repairs, &c. In the Master's office, the parties agreed to proceed on affidavit, and the Master had permitted the Plaintiff to use the answer of *Macqueen* by the way of an affidavit, as evidence against *Campbell;* exceptions were taken to the Master's report, and the 10th exception was on the ground that this evidence had been improperly admitted.

Mr. *Pemberton* and Mr. *Beavan*, in support of the exceptions, contended that the answer of the Co-defendant had been improperly received, it not having been sworn with reference to the issue between the parties in contest in

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in the Master's office. That it was quite contrary to principle to admit of the answer of one Defendant, put in as a defence for himself alone, as evidence against his Co-defendant. That, even as to questions of cost, where the greatest latitude prevailed, *Howel* v. *George* (*a*), *Meader* v. *M'Cready* (*b*), the answer of one Defendant could not be read against another; *Chervet* v. *Jones.* (*c*) They also cited *Jones* v. *Turberville* (*d*), *Morse* v. *Royal* (*e*), *Eade* v. *Lingood.* (*g*)

Mr. *Kindersley* and Mr. *Elderton*, *contrà*, contended, the cases cited did not apply; for unquestionably the answer of one Defendant could not be used against a Co-defendant at the hearing. But this was a case where the parties by agreement proceeded in the Master's office by affidavit; and there could be no question but that the answer of *Macqueen*, who was no longer a party to the cause, if now put into the shape of an affidavit, could be used against a party formerly a Co-defendant. Here was the statement of a witness taken upon oath, which was as valid and binding as if the matter were repeated in an affidavit.

The MASTER *of the* ROLLS. The last of these exceptions, which has been argued upon the present occasion, relates to the use which was made of the answer of the Defendant, Mr. *Macqueen*, in the Master's office; and the question is, whether it is legal evidence to be used upon such an occasion. Now certainly there is no rule more distinct as to evidence than this, that it ought not only to be evidence in a matter in issue between the parties, but it ought to be the evidence of a person

(*a*) 1 *Mad.* 13.
(*b*) 1 *Molloy*, 119.
(*c*) 6 *Mad.* 267.
(*d*) 2 *Ves.* jun. 11.
(*e*) 12 *Ves.* 361.
(*g*) 1 *Atk.* 204.

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person disinterested, and giving it for the purpose of declaring the truth upon the occasion on which it is adduced. Now the answer is an answer which is put in to the bill filed by the Plaintiff against the Defendant in the cause, for the purpose of maintaining his own interest as against the Plaintiff. It is put in as his defence to the demand made against him by the Plaintiff, and states no more, than that which according to the advice he receives, applies to that particular purpose. It is put in for the purpose of promoting his own interest, not for the purpose of declaring the truth as a disinterested witness between two other parties who are in contest together; and on that ground, and on that ground alone, I am of opinion that the answer is not legal evidence to be used for the purpose which it was used in the Master's office. (*a*)

(*a*) The Plaintiffs appealed from the order of the Master of the Rolls, on all the exceptions except the tenth, and the order was, on hearing before the Lord Chancellor, substantially confirmed.

MACKINNON *v.* PEACH.

April 21.
May 31.

Bequest of chattels to two legatees, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to the other. One of the legatees died in the testator's lifetime: Held, that the other was absolutely entitled by survivorship.

Annuities held upon the construction of the will to be cumulative, and not substitutional.

THE questions in this case arose upon the construction of the will of *Charles Mackinnon*, Esquire. The testator, at the date of his will, had two daughters, the Plaintiff and her sister *Maria Sophia*; and by his will dated the 22d of *March* 1831, which was divided into

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into different clauses, numbered from 1 upwards to 13, after giving and devising all his worldly estate or property to his trustees, upon the trusts hereinafter mentioned, the testator thus expressed himself: — "I request that my plate and plated ware, together with the pearls and other articles in my possession, may be divided between my dear daughters *Maria Sophia* and *Sophia Jane*, share and share alike; and upon the demise of either of them without lawful issue, then the share of her so dying shall go to her sister; and failing of my said dear daughters and their lawful issue, the said plate and plated ware, pearls, and other articles, are to be sold, and the proceeds or sale value is to be in the meantime laid out as a part of my estate, in the established parliamentary funds of *Great Britain*." In the fifth clause he expressed himself thus: — "The lease of my house in *Grosvenor Place*, together with its furniture and fixtures, are to be sold to the highest bidder, at the option of my said daughters; and the proceeds or sale value thereof is likewise to be laid out in the parliamentary funds, or in freehold lands, as hereinafter mentioned." By the sixth clause of his will, the testator "charged his estate, monies, and effects, for the sole and separate use and benefit of each of his daughters, independently of her husband, for the term of her natural life, with the sum of 200*l.* sterling yearly, to be settled upon them before marriage; and he directed the said annual sum of 200*l.* should on no account be subject to the control or disposition, or to the debts or engagements, of her husband, &c."

In the seventh clause, he expressed himself thus: — "Believing that 2200*l.* a year will be sufficient for the use of my dear daughters, together with the use of my house and its furniture, I direct the yearly saving or residue of the dividends, interest, or profits or rental of my

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my moneys and estates, to be yearly or half yearly laid out, in trust, in purchasing stock in the parliamentary funds of *Great Britain*, and the interest or dividends arising from such purchases, are to be also yearly or half yearly invested in the purchase of government stock, and to become a part of my estate or principal. Should the lease and furniture of my house be sold, the yearly income of my daughters, so long as they remain unmarried, is to be made up to 2500*l.* a year, payable half yearly.

In the eighth article, the testator directed his money and effects to be, within five years after his decease, invested in the purchase of two separate and clear indefeasible lands or hereditaments of equal value, or nearly so, to be entailed for ever upon his two daughters respectively, and upon the sons of their bodies, and the heirs male of such sons. And he directed, that if either of his daughters should die before marriage, or within five years after his demise, only one estate should be purchased; and if either should die without lawful issue, her estate or shares were to go to her surviving sister, and, upon the survivor's death, to go to her lawful issue; and there was a gift over, on failure of issue of both daughters.

The daughter *Maria* died in *June* 1833 unmarried, and on the 14th of *September* 1833, the testator made a codicil to his will, in which he expressed himself as follows: — "I do hereby bequeath to my dear daughter *Sophia Jane*, in my said will named, the further sum of 100*l.* a year in addition to the 200*l.* therein stated; which sum of 300*l.* is to be settled upon my said dear daughter before her marriage, and for her sole and separate use." He subsequently proceeded as follows: — "Placing every confidence in my said daughter, and being most anxious to secure her comfort and happiness, I also

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I also particularly will and desire, that out of the annual rent, interest, and dividends, accruing from my estate, monies, and effects, the further sum of 1000*l.* sterling be paid to her yearly, during the term of her natural life, for the maintenance of herself, establishment, and family; and her receipt shall be a sufficient discharge for the same; the said sum of 1000*l.* to be paid half yearly to my said daughter, out of respect to the memory of my beloved wife, and my angelic daughter *Maria*." He then desired certain specific articles might be considered as heirlooms.

The testator died in 1833.

There were two questions argued; first, whether the share of the plate, &c., originally given to *Maria Sophia*, in consequence of her death in the testator's lifetime, devolved to the Plaintiff, the other daughter; and, secondly, as to the amount of income to which the Plaintiff was entitled, there having been no investment on real estate.

It appeared that the income of the testator's estate, after other charges, did not exceed the amount of the two annuities of 2200*l.* and 1000*l.* a year.

Mr. *Pemberton* and Mr. *Renshaw*, for the Plaintiff, contended that the Plaintiff, the surviving daughter, was entitled to the plate absolutely, and that she was entitled to two annuities of 2200*l.* a year and 1000*l.* a year.

Mr. *Tinney* and Mr. *Beavan*, *contrà*, argued that the gift of the plate to the daughters, "to be divided between them," created a tenancy in common, and therefore the benefit of the gift would not pass to the survivor, unless by the express gift over upon the demise

demise of one without lawful issue. That the gift over was void, as it was to take effect upon an indefinite failure of issue. They contended that the gift of one half of the plate, &c., would consequently lapse and fall into and form part of the residue. They also contended that if the gift over were void in the first instance, the circumstance of the death of one of the daughters in the testator's lifetime would not cure its original invalidity. As to the annuities bequeathed to the Plaintiff, they contended that they were substitutional, and not cumulative; that the gift of the 2200*l.* to the daughters, not being in direct terms, but by implication only, it could not be construed as a joint gift, so as to survive to the Plaintiff: that on the construction of the will, taken alone, each of the daughters would be entitled to half of the 2200*l.* a year, of which 200*l.* a year was to be settled for their separate use; and consequently, that each of the daughters, under the will alone, would be entitled to 200*l.* a year for her separate use, and a further annuity of 900*l.* a year, making in the whole 1100*l.* a year for each: that the effect of the codicil was to increase the 200*l.* a year to 300*l.* a year for the Plaintiff's separate use, and to increase the 900*l.* a year to 1000*l.* a year; so that, on the whole, the Plaintiff would be entitled to 1200*l.* a year only.

Mr. *Richards*, for the trustees.

Mr. *Pemberton*, in reply, contended, as to the plate, &c., that the will speaking not from its date, but from the death of the testator, the gift over would, after the death of one of the daughters without issue, take effect; and if not, then that it was undisposed of by the will, and would belong to the Plaintiff as the sole next of kin of the testator. That the legacies being different in amount, and being given for a different motive, and especially as "further sums," were cumulative.

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In this case two questions, arising upon the construction of the will of *Charles Mackinnon*, were reserved for consideration: first, whether the Plaintiff is entitled to the share of plate and certain specific articles, which was in the first instance bequeathed to her sister; and, secondly, what amount of income the Plaintiff is entitled to receive out of the annual interest and dividends of the testator's estate.

The testator, at the date of his will, had two daughters, the Plaintiff and her sister, *Maria Sophia;* and the words upon which the first question arises, are as follow. [His Lordship stated the portion of the will relating to the plate, &c.]

The daughter, *Maria Sophia*, died in *June* 1833; and the testator, though he afterwards, on the 14th of *September* 1833, made a codicil, in which he altered some of the dispositions in his will, in consequence of her death, did not take any notice of the gift of plate and other articles.

The gift is to two, to be divided between them, share and share alike; and if both had survived the testator, they would have been entitled as tenants in common; as one died in the lifetime of the testator, her share in one sense lapsed, as to her, and could not be claimed by her representatives; but, in the event of either daughter dying without lawful issue (and in this case the deceased daughter died unmarried), her share is given to her sister, *i. e.* to the survivor of the two daughters; and I am of opinion, that the circumstance of the deceased daughter having died in the lifetime of the testator, does not prevent the gift over to her sister from taking effect, and consequently, that the Plaintiff is now entitled to the

the whole of the plate and plated ware, pearls, and other articles comprised in the clause of the will to which I have referred: see *Northey* v. *Burbage* (*a*), *Willing* v. *Baine* (*b*), *Humphreys* v. *Howes* (*c*), and other cases.

The other question arises upon the clauses of the will which are numbered six and seven, and upon the codicil. [His Lordship stated the sixth, seventh, and eighth clauses.]

Although, in this (the eighth) clause, he has contemplated the event of one daughter dying within five years after his death, *i. e.* within the time during which the accumulations of income were to be made, he has not, in his will, expressly stated what income the surviving daughter was to have during that period; and upon the will, it appears to me, that, during the five years, he intended the two daughters, and the survivor of them, to have an income of 220*l.* a year, together with the house, or an income of 250*l.* a year without the house. At the end of five years, a distinct estate was to be purchased for each daughter and her issue; and, upon the marriage of either, a separate income of 200*l.* a year was to be secured to her. Many contingencies might have occurred which are not provided for; but in this state of things, one of the daughters died: and, in his codicil, he has first stated that the separate income to be secured to the Plaintiff (the surviving daughter) on her marriage should be increased from 200*l.* to 300*l.* a year, and then he proceeds. [His Lordship stated the codicil.]

It

(*a*) *Prec. in Chancery*, 471. pl. 4.
(*b*) 3 *P. W.* 113.
(*c*) 1 *Russ. & M.* 639.

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It is suggested, by the trustees, that the 1000*l.* thus given by the codicil was intended as a substitution for the provision made by the will for the two daughters, and that the expression "further sum of 1000*l.*," meant a sum in addition to the 300*l.* directed to be secured to the separate use of the Plaintiff on her marriage. It does not appear to me, however, that the words admit of this interpretation. I think that sum directed to be secured for the separate use of the daughter, is to be secured in reference to a marriage, and by arrangements to be made in contemplation of and before the marriage, and in the meantime remains part of the general income, or of the sums given or intended for the maintenance of the daughter before marriage.

The annual sum of 2200*l.* was intended by the will for the maintenance of the two daughters whilst unmarried. It was given in terms to make it a joint interest or benefit; and in one event contemplated (viz. the death of a daughter within five years), the testator has in his will shewn no intention to reduce it; and, in the codicil, he introduces the gift of a further sum of 1000*l.* to his surviving daughter, for the maintenance of herself, establishment, and family, by words which express his confidence in her, and his anxiety to secure her comfort; and subjoins to them words, by which he attributes this further provision, to respect to the memory of his deceased wife and daughter.

There are, I think, considerable difficulties in construing the words of the will and codicil in a manner that is quite satisfactory; but on the whole it appears to me, that the effect is to give to the Plaintiff out of the income of the testator's property a sum of 1000*l.* a year, in addition to the 2200*l.* a year intended for herself and her sister, if her sister had survived.

That,

That, if there should be any surplus after payment of the two annual sums of 2200*l.* and 1000*l.*, the same was to be accumulated. That the testator's estate, together with the accumulations, were, at the end of five years from his death, to be invested in the purchase of lands, to be settled as in the will mentioned; and that the Plaintiff, from the end of five years, will be entitled to the whole income; and provision is to be made on her marriage, for securing to her 300*l.* a year for her separate use.

Although the testator has directed the further sum of 1000*l.* to be paid to her yearly, during the term of her natural life, and her receipt to be a sufficient discharge for the same, yet it does not appear to me consistent with the other provisions, that this is to be made a separate payment, either after the expiration of five years, or after the marriage of the Plaintiff. After the expiration of five years, the investment which gives the Plaintiff the whole income is to be made; and after the marriage, it is no longer her establishment which is to be maintained.

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July 9, 10.

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A testator gave certain annuities out of his residuary estate to his three children, "and requested the surplus of the annual income to be applied in accumulation of the capital of his property for the benefit of his grandchildren," and which was to be divided between them after the death of the survivor of the testator's three children. Thirty years elapsed between the death of the testator and of the survivor of his children: Held, that the direction for accumulation, beyond twenty-one years from the testator's death, was void under the first section of the *Thellusson* Act, and that the case did not come within the exception of the second section.

THE questions in this case arose on the will of *Joseph Wildsmith*, dated the 11th of *January* 1804, whereby, after giving a life interest in a part of his estates to his servant *Mary Nicholson*, he gave to his trustees all his freehold and leasehold land, and all other his real and personal estates whatsoever, "upon trust that they, his said trustees, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, should, at any time or times after his decease, when they should think proper, sell, dispose of, and convert into money, all or any part of his real and personal estate; and invest and place out upon security, the money arising therefrom, after payment of his debts, funeral, and testamentary expenses, and the costs and charges attending the execution of his said will; and should

Held also, that the void accumulations did not belong to the residuary legatees, but that they were undisposed of.

Held, upon the construction of the terms of the will, that such part of the void accumulations as arose from the real estate belonged to the heir at law, and not to the next of kin.

The *Thellusson* Act, which restricts the accumulation of property, does not operate to alter any disposition in a will, except only the direction to accumulate. Striking that direction out, every thing else is left as before; and all the other directions in the will as to the time of payment, the substitution of interest, or any contingencies, take effect unaltered by the statute.

A gift between grandchildren living at the testator's death, to be divided between them on the death of the survivor of three persons, with a gift over to the survivors, in case of the death of any before he should be entitled to receive his share, and to be paid at the same time, and in the same manner, as before mentioned touching the original share. The gift over held to apply to the accruing as well as to the original share.

A suit to administer an estate, having been rendered necessary by the form of the will of a testator, who had blended his real and personal estate into one common fund, the costs of the suit were directed to be paid *pro ratâ* by the heir, and personal representatives, out of accumulations devolving on them, in consequence of the directions of the testator to accumulate, having partially exceeded the limits prescribed by the statute.

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should receive the rents, interest, and annual produce of his said real and personal estate until the sale thereof, for the purpose of raising the annuity and weekly payments therein by him bequeathed; and after giving a power to his trustees, if they thought fit, of carrying on his trade or business of a carpet manufacturer, in the manner therein mentioned, he gave some directions for carrying it on, and gave a weekly sum of one guinea to each of his sons, *Joseph* and *Benjamin*, for their lives, and an annual sum of 54*l.* 12*s.* to his daughter *Elizabeth Eyre;* which annual and weekly payments he directed to be made by his trustees, out of the rents, issues, and annual profits of his estates and effects, and he then proceeded as follows: "and the surplus of such annual income, (if any) I request may be applied in accumulation of the capital of my property, for the benefit of my grandchildren; and from and after the death of my said children, the said *Joseph Wildsmith*, *Benjamin Wildsmith* the elder, and *Elizabeth Eyre*, and the longest liver of them, upon trust, that they my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall sell, and convert into money, all such part of my estate and effects as shall not consist of specie, and from time to time call in and receive the money, which shall be placed out upon security as aforesaid, and pay, distribute, and divide the same, after deducting the expenses of performing this my will, and the legacies herein-after mentioned, unto and amongst all and every my grandchildren, who shall be living at the time of my decease, equally share and share alike, save and except the share of *Francis Maceroni*, one of the children of my late daughter, *Mary Ann Maceroni*, deceased, one moiety or half part of whose share of my estate and effects, I give and bequeath to his brother *George Maceroni*, in consideration of the benefit, derived by the said *Francis Maceroni*, from the will of my late brother *Benjamin Wildsmith*, deceased;

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deceased; and I do will and direct, that the shares of such of my said grandchildren, as shall be under the age of twenty-one years, at the time of the decease of the survivor or longest liver of my said children, shall be placed out or continue upon security, and the interest thereof, shall be applied in the maintenance of my infant grandchildren, during their respective minorities; and in case any of my said grandchildren shall die before his, her, or their share or shares of my estate and effects shall become payable by virtue of this my will, leaving lawful issue, then such issue shall be entitled to the share or shares, which his, her, or their deceased parent or parents would have been entitled to, if then living; but in case of the death of any of my said grandchildren, without leaving issue, before he, she, or they shall become entitled to receive, his, her, or their share or respective shares, of my said estate and effects in manner aforesaid, then I give and bequeath the share or shares of such deceased grandchild or grandchildren, unto and equally among my surviving grandchildren, to be paid at the same time, and in the said manner, as before mentioned, touching the original share or shares of my said grandchildren.

The testator died on the 19th of *October* 1804. He had ten grandchildren then living, two of whom were the children of *Mary Ann Maceroni*, a deceased child of the testator. The parents of the other eight grandchildren, namely, *Joseph*, *Benjamin*, and *Elizabeth*, to whom the testator had given the weekly payments and an annuity by his will, were living at the testator's death. *Elizabeth Eyre* was the survivor of the testator's children, and she died on the 9th of *April* 1834, nearly thirty years after the death of the testator. Of the ten grandchildren living at the testator's death, five were living at the death of *Elizabeth Eyre*, and were now, at the hearing, living, namely, *Mary Ann Smith*, *John Peter*

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Peter Wildsmith, *James Eyre*, *Francis Maceroni*, and *George Maceroni*. The other five grandchildren died in the lifetime of *Elizabeth Eyre*, and some of them left issue. See the pedigree, p. 570.

The principal questions discussed in this case, were first, whether the directions to accumulate beyond twenty-one years after the death of the testator, was or was not void under the *Thellusson* Act. (*a*) Secondly, if void, then whether, under the terms of this act, which directs the accumulation to go and be received by the persons, who would be entitled thereto, if the accumulation had not been directed, the void accumulations belonged to the residuary legatees or were undisposed of by the will; and if so, then, thirdly, whether by the directions to the trustees to sell, there had been a conversion of the real into personal estate; or in other words, whether that part of the void accumulations, which had arisen from the real estate, belonged to the next of kin, or to *Mary Ann Smith*, the testator's heiress at law.

It was argued for the Plaintiffs, and for some of the Defendants in the same interest, that the direction for accumulation, so far as it exceeded the term of twenty-one years from the decease of the testator, was void under the provisions of the *Thellusson* Act of the 39 & 40 *G.* 3. *c.* 98., which, in the case of a will, forbids the rents &c., of property, being wholly or partially accumulated for any longer term than twenty-one years from the death of the testator; and enacts that the direction for accumulation, otherwise than as aforesaid, shall be null and void, and shall go to "the persons who would have been entitled thereto if such accumulation had not been directed." That the case did not come within the exception of the second section of that act, which excludes

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cludes from its operation, those cases, where the testator has made a provision for raising portions for any child or children of any devisee, or any child or children of any person taking *any interest* under any such devise. That this was not a direction for raising portions for the grandchildren, but a direction to increase the corpus, to be divisable amongst them at a remote period. That this must be the proper construction of the act, otherwise a gift to a parent, however small, would prevent the operation of that statute. It was further argued on the same side, that as to some of the class of grandchildren, namely, the *Maceronis*, their parents took nothing under the will, and that they therefore, could not by any possibility come within the second section. Another objection was, that the accumulations were intended not only for the benefit of the grandchildren, but, in certain events, of the great grandchildren who clearly were not excepted by the second section of the act.

On the other hand, it was contended, that the direction for accumulation, beyond the twenty-one years after the death of the testator, was valid, as coming within the exception of the second section; a provision, in the nature of portions, being intended for the grandchildren, the parents of whom, clearly took "an interest" under the devise.

That this was, in effect, a gift of a portion of the income to one for life, with a direction to accumulate the remainder for his children, which was the case expressly excepted from the operation of the statute. That, as by the common law, the power of directing accumulations, was co-extensive with the rule against perpetuities, the direction, independently of the statute, would be valid; and the statute, being in restriction of a common law right, must be construed strictly; and if this

this case came within the literal terms of the exception, the Court could not adjudge it illusory.

But, supposing the Court to hold the direction to accumulate beyond the twenty-one years to be invalid, the next question which arose was, to whom the void excess of the real and personal estate belonged. The residuary legatees claimed it as part of the residue, contending, that as they had vested interests, they "were the persons entitled thereto, if such accumulation had not been directed;" and that their right to the excess of the accumulations would be merely accelerated by the operation of the statute, the gift being vested, though the enjoyment was intended to be postponed.

The next of kin claimed the whole accumulation arising both from the real and personal estate. They claimed that portion arising from the real estate, on the ground that the direction to sell had converted it into personalty.

The heiress at law concurred with the next of kin in the argument against the residuary legatees, but claimed that portion of the void accumulated fund, arising from the real estate, on the ground that the sale of the real estate being directed for a particular purpose, which as to the void accumulations failed, the produce undisposed of still retained its character of reality, and passed to the heiress at law; *Robinson* v. *Taylor* (*a*), *Mallabar* v. *Mallabar* (*b*), *Durour* v. *Motteux* (*c*), *Kennell* v. *Abbott* (*d*), *Ackroyd* v. *Smithson.* (*e*)

As to the construction of the *Thellusson* Act; *Griffiths* v. *Vere* (*g*), *Longdon* v. *Simson* (*h*), *Lord Southampton* v. *Marquis*

(*a*) 2 *B. C. C.* 589.
(*b*) *Forrest*, 79.
(*c*) 1 *Ves.* sen. 320.
(*d*) 4 *Ves.* 802.
(*e*) 1 *Br. C. C.* 503.
(*g*) 9 *Ves.* 127.
(*h*) 12 *Ves.* 295.

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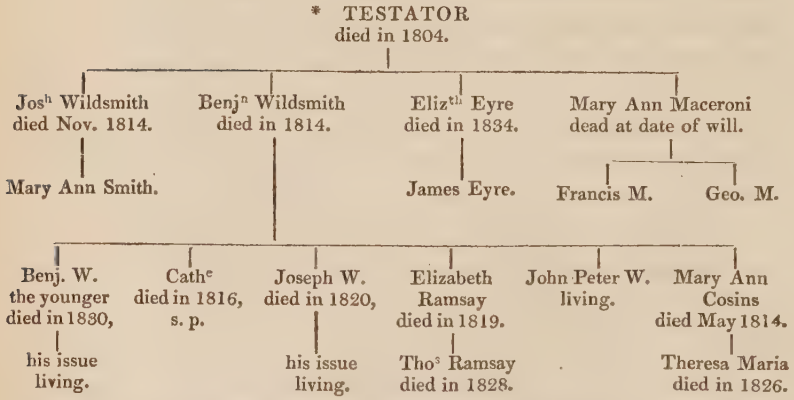
v. *Marquis of Hertford* (*a*), *Leake* v. *Robinson* (*b*), *Haley* v. *Bannister* (*c*), *Marshall* v. *Holloway* (*d*), *Bacon* v. *Proctor* (*e*), *Palmer* v. *Holford* (*g*), *Crawley* v. *Crawley* (*h*), *Shaw* v. *Rhodes* (*i*), *Macdonald* v. *Bryce* (*k*), *O'Neill* v. *Lucas.* (*l*)

The other questions in this cause arose out of the following alterations in the state of the family *, which occurred after the testator's death; the testator, at the time of his death, in 1804, had, as has been already stated, ten grandchildren then living, namely, *Mary Ann Smith*, the only child of the testator's son *Joseph*; *Benjamin Wildsmith* the younger, *Catherine Wildsmith*, *Joseph Wildsmith* the younger, *Elizabeth Ramsay*, *John Peter Wildsmith*, and *Mary Ann Cosins*, who were the five children of the testator's son *Benjamin*; *James Eyre*, the son of the testator's daughter *Elizabeth Eyre*; and *Francis* and *George Maceroni*. Five of the ten grandchildren, namely, *Benjamin Wildsmith* the younger, *Catherine Wildsmith*, *Joseph Wildsmith*, *Elizabeth Ramsay*,



(*a*) 2 *V. & B.* 54.
(*b*) 2 *Mer.* 389.
(*c*) 4 *Mad.* 275.
(*d*) 2 *Swan.* 432.
(*e*) 1 *Turn. & R.* 31.
(*g*) 4 *Russ.* 403.
(*h*) 7 *Sim.* 427.
(*i*) 1 *My. & Cr.* 135.
(*k*) *Antè*, 276.
(*l*) *Antè*, 313.

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say, and *Mary Ann Cosins*, died in the lifetime of the testator's daughter, *Elizabeth Eyre*. Two of them, *Benjamin Wildsmith* the younger, and *Joseph Wildsmith* the younger, left children, who were living at the decease of *Elizabeth Eyre*. *Mary Ann Cosins* died in 1814, leaving one child, *Theresa Maria Cosins*, who died in 1826, in the lifetime of *Elizabeth Eyre*. *Catherine Wildsmith* died in 1816, unmarried; and *Elizabeth Ramsay* died in 1819, leaving issue, *Thomas Ramsay*, who also died in 1828, in the lifetime of the testator's daughter, *Elizabeth Eyre*.

Under these circumstances, the following additional questions arose, namely, whether the portions which accrued to the several parties, by the deaths of some of the legatees in the lifetime of *Elizabeth Eyre*, became divested by the deaths of such parties in the lifetime of *Elizabeth Eyre*, and went over to the survivors; or whether such accrued portions passed to the representatives of such deceased parties; and, secondly, whether the gift of half the share of *Francis Maceroni*, which was given to *George Maceroni*, applied to the shares which accrued to him by the deaths of several of the grandchildren, in the lifetime of *Elizabeth Eyre*, as well as to his original share.

On the point of the accruer, the following cases were cited; *Attorney-General* v. *Crispin* (*a*), *Worlidge* v. *Churchill* (*b*), *Ferguson* v. *Dunbar* (*c*), *Rudge* v. *Barker* (*d*), *Pain* v. *Benson* (*e*), *Skrymsher* v. *Northcote* (*g*), *Cripps* v. *Wolcott* (*h*), *Barker* v. *Lea* (*i*), *Hoghton* v. *Whitgreave* (*k*), *Crowder* v. *Stone* (*l*), *Pope* v. *Whitcombe* (*m*), *Pearson* v. *Stephen* (*n*), *Bright* v. *Rowe*. (*o*)

Mr.

(*a*) 1 *B. C. C.* 386.
(*b*) 3 *B. C. C.* 465.
(*c*) 3 *B. C. C.* 468. note.
(*d*) *Cas. Temp. Talbot*, 124.
(*e*) 3 *Atk.* 78.
(*g*) 1 *Swan.* 566.
(*h*) 4 *Mad.* 11.
(*i*) *Turn. & R.* 413.
(*k*) 1 *J. & W.* 146.
(*l*) 3 *Russ.* 217.
(*m*) 3 *Russ.* 126.
(*n*) 5 *Bli. N. S.* 203.
(*o*) 3 *My. & K.* 316.

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Mr. *Kindersley* and Mr. *Bichner*, for the Plaintiffs.

Mr. *Treslove* and Mr. *Tillotson*, for the heiress at law.

Mr. *Agar*, Mr. *Pemberton*, Mr. *Temple*, Mr. *Spence*, Mr. *Duckworth*, Mr. *Rogers*, Mr. *Parker*, Mr. *K. Parker*, Mr. *Booth*, Mr. *Campbell*, Mr. *Taylor*, Mr. *G. Richards*, and Mr. *O. Anderdon*, for other parties.

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The object of this suit is to obtain the direction of the Court, for the distribution of the estate of *Joseph Wildsmith*, the testator in the cause. [His Lordship referred to the terms of the will of the testator, and the state of his family at his death, and proceeded.] As the testator directed the surplus income of his estate to be accumulated during the lifetime of the survivor of his children, and *Elizabeth* his surviving child lived more than twenty-one years, namely, between twenty-nine and thirty years after his death, it is contended on the behalf of the Plaintiffs, that the direction to accumulate beyond twenty-one years is void under the statute of the 39 & 40 *G.* 3. *c.* 98. (the *Thellusson* Act), and that the income accrued since the expiration of the twenty-one years, and the accumulations thereof, belong to the testator's next of kin. The heir at law concurs in the argument, that the direction to accumulate, is void for the excess above twenty-one years; but claims such portion of the subsequent income and accumulations, as have arisen from the produce of the testator's real estate. On the other hand, it is contended, first, that as the parents of eight out of the ten grandchildren, took beneficial interests under the will, the direction to accumulate is lawful under the second section of the act, if not as to the whole fund, at least as to such part of it, as was not given to the two grandchildren,

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children, whose parent being dead took no beneficial interest under the will; and secondly, that if the direction to accumulate beyond twenty-one years be void, the effect of the statute will be, not to give the subsequent interest to the next of kin, or heir at law, but to accelerate the gift to the grandchildren, and to give them the whole interest. The statute, after directing that no testator shall dispose of his property, so that the income thereof, shall be wholly or partially accumulated, for more than twenty-one years from the time of his death, and that in every case where any accumulation shall be directed, otherwise than as aforesaid, such direction shall be void, provided "that nothing in the act contained shall extend to any provision for raising portions for any child or children of any person or persons taking an interest under the devise." As two of the grandchildren, for whose benefit the accumulation is directed, were not the children of any person taking an interest under the will, and as the accumulation which is directed, does not appear to me to be a provision for raising portions, but a provision for making additions to the capital, for the purpose of making one gift of an aggregate fund, I think that this case is not within the proviso of the act, and that the direction to accumulate for more than twenty-one years is void.

The statute provides, that when the direction to accumulate is made void, the rents and produce of the property directed to accumulate, shall go to and be received by such person or persons, as would have been entitled thereto, if such accumulation had not been directed. It is argued, that the effect of this is, first to stop the accumulation, and then to give the rents, of which the accumulation is not allowed, immediately to the persons for whose benefit the accumulation was intended. But it appears to me, that this would be in effect to make a new will, or a new disposition for the testator. The testator,

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testator, having regard to the death of his youngest child, has directed his property, subject to certain payments, to be accumulated, and he has also provided, that, during the life of the youngest child, the vested interests which he has previously given may be divested. He has given vested interests to all his grandchildren living at his own death; but nothing is to be paid to them till the death of his surviving child, and in the meantime the interests may be divested and become vested in other persons; and to direct that payments shall be made at the end of twenty-one years, before the death of the testator's surviving child, would be to direct that which the testator has not directed, and to give and defeat interests directly contrary to his meaning and intention.

The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, every thing else is left as before, and all the other directions of the will, as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute. I think, therefore, that the income which the statute forbids to be accumulated, must go as in the case of intestacy.

And then arises the question between the heir at law and the next of kin. The testator empowered the trustees to sell the real estate when they pleased after his death; if not done before, he ordered them to sell after the death of his youngest child; but the sale was directed for the purposes of the will only, and for the benefit of the grandchildren or their children, not for the benefit of the next of kin. It happens that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be

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be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as they can be lawfully carried into effect, do not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest.

The other questions relate to the administration and distribution of the fund lawfully accumulated, and depend solely on the construction and effect of the will; and considering this, it appears that the testator intended, that subject to the weekly sums, and annuity given to his surviving children, the whole of his property should accumulate till the death of his surviving child, and should then be divided among all his grandchildren then living; but if any of them were then dead without leaving issue, then among the survivors; and that if any of them were then dead, leaving issue, then that the issue of such deceased grandchildren, should have the share, which their parents would have been entitled to if living. This appears to me to be the scope and intention of the will: he meant an aggregate and previously undivided fund, to be distributed and divided on the death of his surviving child. Interests were previously vested; but up to that time, the vested interests were subject to be divested; and I think the plain intention of the testator cannot be carried into effect, without applying this principle, to every interest which became vested under this part of the will, in the different events which happened; to the interests in the accrued shares which became vested in the grandchildren, and to the interests in the original or accrued shares, which became vested in the children of grandchildren.

On the death of Mrs. *Cosins*, her expectant share became vested in her daughter *Theresa;* on the death of *Catherine Wildsmith*, her expectant share became vested in

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in the eight surviving grandchildren, and *Theresa Cosins;* on the death of Mrs. *Ramsay*, her expectant share became vested in her son *Thomas;* on the death of *Joseph Wildsmith* the younger, his expectant share became vested in his children; on the death of *Theresa Cosins*, her expectant share became vested in the six surviving grandchildren, *Thomas Ramsay*, and the children of *Joseph Wildsmith;* on the death of *Thomas Ramsay*, his expectant share became vested in the six surviving grandchildren, and the children of *Joseph Wildsmith*, in equal seventh parts; and on the death of *Benjamin Wildsmith* the younger, his expectant share became vested in his children.

I think, therefore, that the lawfully accumulated fund is devisable in sevenths; that one seventh is payable to *Mary Ann Smith;* one seventh to the children of *Benjamin Wildsmith;* one seventh to the children of *Joseph Wildsmith;* one seventh to *John Peter Wildsmith;* one seventh to *James Eyre;* and the remaining two sevenths to *Francis* and *George Maceroni.* And with respect to these, the testator, after directing an actual division among his grandchildren, has made an exception in these words, "save and except the share of *Francis Maceroni*, one of the children of my late daughter *Mary Ann Maceroni*, deceased; one moiety or half part of whose share of my estate and effects I give and bequeath to his brother *George Maceroni*, in consideration of the benefit derived by the said *Francis Maceroni*, from the will of my late brother *Benjamin* deceased." I think that the effect of this exception is to transfer from *Francis* to *George*, one moiety of that which *Francis* would otherwise have received in respect of his original share, and also in respect of the shares which would have accrued to him upon the death of *Catherine Wildsmith*, *Theresa Cosins*, and *Thomas Ramsay*, and in the result *Francis Maceroni* is entitled only to one fourteenth of the fund, and

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and that *George Maceroni* is entitled to three fourteenths thereof. These are the several points argued, and the decree must declare that the direction to accumulate in the will is void as to the time, exceeding the term of twenty-one years after the testator's death; that the income, arising after the expiration of the term of twenty-one years from the testator's death, of so much of the fund as consists of the testator's personal estate, or the produce thereof, belongs to the testator's next of kin; and of so much of the fund as consists of the produce of real estate, belongs to the testator's heir at law; that the shares which accrued to the grandchildren, or children of the grandchildren, of or under the provisions of his will, were subject to be divested on the death of such grandchildren or children of the grandchildren in the lifetime of the testator's surviving child, in the same manner as the original shares given by the will to the grandchildren; that the representatives of the deceased children of the testator's grandchildren, who died in the lifetime of the testator's surviving child, are not entitled to any share of the testator's estate; and that *George Maceroni* is entitled to three fourteenths, and *Francis Maceroni* to only one fourteenth of the accumulated fund.

Some of the parties applied to have the costs of the suit taxed, and paid as between solicitor and client, relying on a former order, which directed the taxation and payment of the costs on that principle.

Mr. *Treslove*, Mr. *Temple*, and Mr. *Anderdon*, *contrà*, opposed the application, contending that such an order could only be made on the consent of all parties. They relied on the case of *Fenner* v. *Taylor* (*a*), where a bill being filed by one of two residuary legatees against the other,

(*a*) 5 *Mad.* 470.

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other, the usual decree was made, and it was held, on further directions, that costs could not be given out of the fund in Court, as between solicitor and client, without the consent of the defendant.

The MASTER *of the* ROLLS. I think, that having regard to the fact, of the Court having, on a former occasion, ordered the costs to be taxed between solicitor and client, and of this being a family cause, and necessarily prosecuted for the purpose of making a distribution of the fund, I may order these costs to be paid out of the fund as between solicitor and client. It is very reasonable.

A question then arose, out of what fund the costs were to be paid.

Mr. *Kindersley* proposed, that they should be paid *pro ratâ* out of the undisposed of part, which had been declared to belong to the heir and next of kin respectively.

Mr. *Treslove*, *contrà*, said that the costs should first come out of the undisposed of personalty which belonged to the next of kin. That the undisposed of personalty ought to be exhausted before the fund belonging to the heir-at-law should be subjected to the costs of the suit; and that the Court would not marshal assets as between real and personal representatives. That the testator had violated the law, in consequence of which a portion of the estate descended to the heir at law, which should be free from costs.

[*The* MASTER *of the* ROLLS. The suit was equally necessary, in order to establish the right of the heir as the right of the next of kin.]

The

The point of costs was again mentioned, when,

The MASTER *of the* ROLLS said: — The testator has given the estate to the trustees, and he has given them a discretionary power to sell during the life time of his grandchildren; and he has expressly ordered, that if not sold in the lifetime of the younger child, it shall afterwards be sold: he has brought the real and personal estate into one fund, and he has directed it to be given to his grandchildren and their children, in certain proportions; but he has directed accumulations to be made, which the law does not allow, the consequence of which is, that there is a portion of his property, that is a portion of the mixed fund, consisting partly of the produce of real and partly of the produce of personal estate which is not disposed of. That portion of the mixed fund not being disposed of, a question has arisen to whom it belongs. I have considered it to belong, partly to the heir, and partly to the next of kin. Then comes the question how the costs of the suit are to be defrayed. I have no hesitation in saying, that I consider this will is so framed, that it was absolutely necessary to come to the Court to have the estate properly administered; because the testator himself has so expressed his intentions, that they could not be safely carried into effect by the trustees, without the direction of this Court; and as to part of them, it was necessary to apply to the Court, for the purpose of having it declared, that they could not be carried into effect at all.

The expense of the suit, therefore, arises from the mode in which the testator has framed his own will, not from the fault of any party to whom he has made a gift by the will, nor in consequence of any improper claim raised by any body, but in consequence of the difficulty which the testator himself has created. The costs, then, of the suit, having arisen from such difficulties, I appre-

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hend it to be the rule of the Court, that they ought to be paid out of the testator's estate. The testator's estate consists, for this purpose, of two portions; one part of this he has legally and effectually disposed of to particular persons; and another part he has not legally or effectually disposed of to any body; and which, therefore, is taken by the persons who are legally entitled, independently of any will of the testator. In this state of things, I apprehend that the costs of the suit ought to be defrayed in such a manner, as not to disappoint the legal donees of the testator, and therefore ought to be taken out of the fund which the testator has not disposed of, and which, in fact, devolves on the persons to whom the law gives it. I conceive that the expense of administering the estate, should be paid out of the undisposed of part of the testator's estate; but the undisposed part of the testator's estate, consists partly of the produce of realty, and partly the produce of personalty. Are the costs to be thrown exclusively on one part? It might be so, if the testator had given directions different from those which he has given; but he has, by his will, constituted these portions of his estate into one common fund, which he has directed to be accumulated, and divided, in the mode pointed out by the will; for the purposes of the will, they are one common fund; but for other purposes, they are not to be so considered, but divisable into two parts, one of which belongs to the next of kin, and the other to the heir at law. Then, having constituted them one common fund for the purposes of the will, I can see no reason why they should not be considered as one common fund for the purpose of paying the costs; and I therefore conceive, that the costs are to be charged upon that part of the testator's estate, which is not effectually given by his will, and to be paid *pro ratâ* out of the two several parts; and, accordingly, the total amount of costs being ascertained and paid, the residue of the fund

fund may be then distributed *pro ratâ ;* what remains as to the one portion will clearly belong to the heir, and what remains as to the other portion will belong to the next of kin.

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The heiress at law appealed from the decision; and the Lord Chancellor, on the 16th of *January* 1838, affirmed the decree except as to the costs.

CARTER *v.* GOETZE.

June 12.
July 23.

THE object of this suit, was to set aside, on the ground of fraud, an agreement entered into by the Plaintiff, for the purchase from the Defendant, of a secret of a process for manufacturing sterine from vegetable oils, and for refining oils.

The bill stated, that the Plaintiff, a wax and tallow chandler, had been in the habit of manufacturing sterine from tallow and other animal matter, but was unable to use palm oil and other vegetable substances, which were much cheaper, for that purpose, he being unable to extract the colour therefrom.

The bill then alleged, that the Defendant representing himself to be possessed of a secret mode, known only to himself, of manufacturing sterine with palm oil and other vegetable substances, in conjunction with tallow, and of refining oil in the manufacture of sterine, proposed to communicate his secret to the Plaintiff on certain

The Plaintiff by his bill sought to set aside an agreement, entered into by him with the Defendant, for the purchase of the secret of a process of manufacture, on the ground of fraud, and of the Defendant possessing no such secret. By the agreement, as stated in the bill, neither of the parties were to divulge the secret. The Defendant demurred to such of the interrogatories of the bill, as sought a discovery of the nature of the

secret, and he answered the remainder of the bill, denying all fraud, and insisting on the existence of the secret process: Held, that the Defendant was bound to discover the nature of the secret.

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certain terms, which the Plaintiff agreed to; and that thereupon certain articles of agreement, dated the 28th of *December* 1836, were executed by the Plaintiff and the Defendant; and thereby it was covenanted and agreed, that the Defendant should, within a fortnight, manufacture on the Plaintiff's premises, a sufficient quantity of animal or vegetable matter into sterine and refined oil, in such a way as to enable the Plaintiff to ascertain the expense thereof, as far as could be done without disclosing the secret; and if the sterine and oil manufactured should not in the opinion of the Plaintiff, or of referees to be appointed, in case the Plaintiff and Defendant should differ in opinion, be equal in quality to a specimen referred to, the Plaintiff might put an end to the agreement. But if no attempt was made to determine the agreement before the 1st of *February* then next, or the Plaintiff's right to determine the same were negatived by the referees, the agreement was to continue in force for seven years, and the Defendant was, within a fortnight after the 1st of *February*, or the decision of the referees, to furnish the Plaintiff with a written statement of the particulars of the secret, and to instruct the Plaintiff and his son in the use of the same. The Plaintiff agreed to manufacture by means of the process, during the term of seven years, three tons of animal or vegetable matter per week, to keep regular accounts, and to make certain proportionate payments to the Defendant. Both parties covenanted that they would not, without the written consent of the other, divulge or make known, in any way, to any person or persons whomsoever, the knowledge of the said secret, or the mode of using the same; and that they would respectively make as careful a use of the same as possible, in conducting the said manufacture, with a view to prevent a disclosure; and the Defendant agreed not to instruct any other person in the use of the secret, during the continuance of the agreement. The bill then alleged,

leged, that the Defendant, in pursuance of the agreement, attempted to manufacture sterine and refined oil, according to his alleged secret method; and it contained the following allegations as to the substance used in these experiments by the Plaintiff. That the Defendant mixed up the said tallow and palm oil, and put into such substance, *some bleaching powder*, for the purpose of extracting the colour from the palm oil; and that the said *G. W. Goetze* did not, at that or any other time, communicate to the Plaintiff the nature of such powder, but shook the same into the mixture of tallow and palm oil, from a paper in which the same was contained; but in such a manner that the Plaintiff did not see the said powder. There were several other similar allegations contained in the bill as to the substance used, and amongst others, the following. That the said Defendant, on the 7th day of *January* 1837, caused the oil which was produced on his first experiment of manufacturing sterine as aforesaid, to be kept by itself, for the purpose of being refined; and that Defendant mixed with the said oils *some article* which he brought in two stone bottles, and the nature of which he never communicated, and the same has never become known to Plaintiff. That the said *G. W. Goetze* in the month of *February* 1837, made another experiment of manufacturing refined oil on a large scale, and that two men were employed under his direction, to agitate an oil cask containing oil, into which the said *G. W. Goetze* had put *some article*, (the nature of which he never communicated, and the same has never become known to the Plaintiff,) for the purpose of making refined oil, as he alleged, of the first quality; and that such experiment was unsuccessful.

The bill alleged that the Defendant's experiments entirely failed; and that the Defendant was not, in fact,

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in possession of any secret for making the article aforesaid, and was and is unable to manufacture sterine, artificial spermaceti, and refined oil, and was ignorant of the mode of manufacturing the same. That the Plaintiff relied on the representation of the Defendant, and being deceived thereby, did not put an end to the agreement in the time therein limited for that purpose; that the Defendant procured the Plaintiff to execute the articles, by representing that he was possessed of a secret, when, in fact, he was not; and that no such secret was ever communicated. On these and other grounds the Plaintiff claimed to be relieved from the contract.

The bill stated also that the Defendant had commenced an action against the Plaintiff in the Exchequer for breach of the agreement; and it prayed, that it might be declared, that the Defendant procured the Plaintiff to execute the articles of agreement by misrepresentation and fraud; that such articles were fraudulent and void as against the Plaintiff; and that the same and an indorsement thereon might be cancelled; and that the Defendant might be restrained from prosecuting the action at law which he had commenced in the Exchequer for the non-performance thereof.

The Defendant, as to such of the interrogatories of the bill as required him to set forth the nature, proportions, and use of the bleaching powder, and of some and what article used in the process of refining the oil, and the nature of his secret, demurred; he however answered the remainder of the bill, denying all the alleged fraud, insisting on the efficacy of the process, and that he had communicated the secret to the Plaintiff.

The demurrer now came on for argument.

Mr.

Mr. *Kindersley* and Mr. *James Russell*, in support of the demurrer, contended, that the Defendant was not bound to answer the interrogatories demurred to, and thereby publish to the world the nature of the secret, which, by the express stipulations of the contract, was not to be divulged. The effect of answering the interrogatories, as to the nature of the secret, would be to deprive the Defendant of the benefit of his ingenuity. That the allegations of fraud on which the Plaintiff's equity was founded, had been wholly negatived by the Defendant's answer, and the bill would probably be dismissed at the hearing; what redress could then be given to the Defendant, for the injury he would have sustained, if he were compelled to answer the objectionable questions? If this demurrer were untenable, then the representation of a fictitious agreement, might enable a man to obtain the discovery of the most valuable secret, and deprive the inventor of the fruits of years of experience and industry. In *Yovatt* v. *Winyard* (*a*), Lord *Eldon* enjoined a defendant from communicating certain recipes for making veterinary medicines, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust. Here, by permitting the Plaintiff to compel the Defendant to divulge the secret, the Court would be assisting in the breach of a contract, which it ought rather specifically to enforce.

Mr. *Pemberton* and Mr. *Piggott*, *contrà*,

Contended that it was necessary for the determination of the question in the cause, that a full discovery should be made. That there was no rule of the Court, which protected a Defendant from making a full discovery, in a case like the present, where the point in issue was, whether

(*a*) 1 *Jac. & Walk.* 394.; and see *Evitt* v. *Price*, 1 *Sim.* 483.

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whether a fraud had or had not been committed. That the form of defence by demurrer and answer could not be sustained; that there was no allegation in the bill, that "the powder" formed any part of the secret, and the Defendant should therefore have pleaded that the effect of answering these interrogatories as to the powder, would be to divulge the secret, and then answer the remainder of the bill. The bill stated, that the Defendant possessed no secret, and sought a discovery, and the Defendant, by demurring, admitted the allegation, that he had no secret, which was the fraud complained of. That the answer in which the Defendant insisted he had a secret, could not be used in support of the demurrer, and thereby conclude the right to the discovery by the Defendant's own oath. That the only purpose for which an answer could be read on the argument of a demurrer, was to enable the Court to see whether the demurrer was over-ruled by it or not, and here by its form the demurrer was over-ruled by the answer.

Mr. *Kindersley*, in reply.

The MASTER *of the* ROLLS [after stating the allegations of the bill].

To this bill the Defendant has put in a demurrer and answer; the demurrer is to so much of the bill as seeks a disclosure of the alleged secret, or anything which might lead to such disclosure; the answer is to the rest of the discovery, and to all relief sought by the bill. It is alleged, that the Defendant has answered every thing which relates to the existence, and to the value of the secret, but he has not answered, and he claims to be entitled, to protect himself by demurrer, from answering or discovering any thing, which relates to the nature and particulars of the secret.

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All the alleged fraud is denied by the answer; and for the demurrer, it is argued, that the Plaintiff having covenanted not to divulge the secret, he is not entitled to call for a disclosure of it to all the world, by requiring an answer to a bill in equity.

If the bill, instead of seeking to cancel the agreement for fraud, had claimed a benefit under it, there would have been great reason to contend, that the Plaintiff should not, in the very act of seeking a benefit under the agreement, be permitted to ask for a discovery, which would lead to a violation of one of the principal provisions which it contains.

But the object of the bill, is to set aside the agreement for fraud, and the alleged fraud is, that the Defendant represented himself to be possessed of a valuable secret, when in fact he was not. If such a fraud exists, relief ought to be given, and the Plaintiff ought to be at liberty to establish the fraud if he can; and if it be true, that the only mode in which such a fraud can be established, is by comparing that which the Defendant alleges to be his secret, with that which was commonly or previously known to other persons, it would seem, that a disclosure is necessary, even for the trial of the case.

As the Defendant has not demurred to the relief, the Plaintiff is at liberty to prove all the facts necessary to establish his case, that fraudulent representations have been made; he is also at liberty to require the usual discovery, unless the Defendant is entitled to some particular exemption; and it is difficult to see, how the Defendant can rely on the agreement, as affording him an exemption, in a case where the validity of the agreement, is the very question at issue between

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between the parties, and can be determined only by the disclosure of the secret.

It cannot be contended, that the oath of the Defendant, even if the answer could be read in aid of the demurrer, is to be conclusive upon the Plaintiff, or that a party who, by a false statement has inveigled another into a fraudulent agreement, is, by merely stating in his answer that the statement was true, to entitle himself to all the profit which the fraudulent agreement purports to give him; there must undoubtedly be a mode of relief, and an investigation of the facts by the production of evidence and by a discovery.

If a man makes a valuable discovery in the way of manufacture, and chooses to keep it secret, he may avail himself of that secret, in any lawful way for his own profit, either by himself, or with the aid of those in whom he places confidence; or if he chooses to disclose the secret which he possesses, he may secure to himself the advantage which is afforded by a patent; but I apprehend, he cannot procure another person to enter into engagements with him, by alleging that he has a secret, without at the same time subjecting himself, in case of dispute, to an enquiry whether there was a secret or not; and that although such an enquiry cannot be conducted without leading to a disclosure of the secret. A man, by entering into such a contract, does not mean to deprive himself of the benefit of the law, and if the law be appealed to, the Court cannot deal with the question between the parties, without ascertaining whether the alleged secret existed; and for the purpose of instituting the inquiry, it is necessary to know, what it is, that was alleged to be a secret.

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On these grounds, it does not appear to me, that the defence which is attempted in this case, could be sustained, even if brought forward in a manner free from objection as to form. It may be thought hard upon a man, in the circumstances of this Defendant, to be called upon to disclose a secret, which by contract between him and the Plaintiff was not to be divulged; but without adverting to any grounds of public policy as applicable to such cases, it is obvious that it would also be hard upon a man, in the situation of the Plaintiff, to have his rights determined, without a legal investigation of the principal question at issue between him and the Defendant.

The demurrer and answer have, in this case, been skilfully framed, with a view, if possible, to protect the Defendant from discovery by such means; but I conceive, that even if the law could, in any case, protect such secrets, it would not be in this form.

If the agreement is valid, there is, as between these parties, a secret which ought to be preserved; but the bill alleges that there is no secret, and the defence that there is a secret, is not stated by way of plea, which justifies a partial answer, but by way of answer joined with a demurrer, and it is a demurrer to the discovery, without being a demurrer to the relief; a demurrer, as Lord *Thurlow* expressed it, not to the thing required, but to the means by which the thing is to be obtained.

There are circumstances, in which the Plaintiff, though not entitled to the whole or part of the discovery he seeks, may nevertheless be entitled, upon evidence to the relief sought by his bill; but cases of this sort, must be cases in which the Defendant is exempted from discovery,

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discovery, by the recognised rules of court, which are not applicable in the present case; and, on the whole, I am of opinion that this demurrer must be over-ruled.

Demurrer over-ruled.

March 26.

JACKSON *v.* NOBLE.

Devise and bequest of freehold, leasehold, copyhold, and 1000*l.* stock, to *A.*, *B.*, and *C.*, *tenendum*, the "said last-mentioned freehold and leasehold messuages, tenements, estates, and premises," and the 1000*l.* upon trust for *A.*: Held, that *A.* was not interested in the copyholds, which descended to the customary heir.

The testator gave real and personal estate to his daughter *A.*, and to two other persons, upon trust, to permit *A.* to receive the rents and interest for life, for her separate use, and after her decease in trust to convey to her heirs, executors, &c.: but, in case *A.* should marry, and have no children, then the property to belong to *D.*; or in case of his decease before *A.*, then to his children: Held, that *A.* took an absolute equitable estate, with an executory gift over, to *D.* and his children, and *D.* having died in the lifetime of *A.*, leaving no children: Held, that *A.* was absolutely entitled to the property.

THIS was a bill filed by *Mary Anne Jackson* and others, against *Mary Ann Noble* and *Edward Leslie*, praying that the wills of *David Russen*, *George William Russen*, and *Jane Russen*, might be established, and that the rights of the parties to certain property given by the will of *David Russen*, to the Defendant *Mary Ann Noble*, might be declared, and that consequential relief might be given.

On the 29th *October* 1813, *David Russen* made his will, and thereby, after giving to his son, *George William Russen*, certain leasehold estates and his money in the funds, with certain exceptions, gave and bequeathed as follows: — "And I do hereby give, devise, and bequeath, all those my freehold estates, situate and being in *Upton Lane*, *Westham*, in the county of *Essex*, in the possession of Mr. *Clark*: Also my freehold estate situate in *Golden Lane*, in the city of *London*, in the possession of Mrs. *Snell* and Mr. *Sandover*: Also my moiety or half part of my copyhold messuage or tenement,

ment, garden and premises, situate at *Westham*, in the county of *Essex*, in the possession of Mr. *Stuart*, and which said estate I have surrendered to the use of this my will: Also my leasehold estate, situate and being in *Philip Lane*, in the city of *London*, in the possession of Mr. *Thomson;* and 1000*l.* 3 per cent. stock unto my daughter *Mary Ann Russen*, and *Matthew Peter Davies*, of *Saint Martin's Le Grand*, and *George William Russen*, of *Aldersgate Street*, Gentleman, their heirs, executors, administrators, and assigns, to have and to hold the said last mentioned freehold and leasehold messuages, tenements, estates, and premises, with their several and respective appurtenances, and the aforesaid 1000*l.* stock, unto my said daughter *Mary Ann Russen*, the said *Matthew Peter Davies*, and *George William Russen*, their heirs, executors, administrators, and assigns, for and according to my several estates, right, interest, and term of years therein respectively. In trust to permit and suffer my said daughter, *M. A. Russen*, and her assigns, to receive and take the interest and dividends of the said 1000*l.* stock, and the rents, issues, and profits of the said several last mentioned estates, for and during the term of her natural life, to and for her own separate, personal, and peculiar use and benefit, independent of any husband, with whom my said daughter shall or may at any time or times hereafter intermarry; and not be subject to his or their debts, powers, control, engagement, or intermeddling; and for which her receipts alone shall from time to time, and at all times hereafter, be full, good, and sufficient discharges, notwithstanding any such coverture, in such and the like manner as if she had continued a feme sole and unmarried, and that to all intents and purposes whatsoever. And from and after the decease of my said daughter, in trust to convey and assign the said several last mentioned freehold and leasehold estates, and the said

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said 1000*l.* stock, unto the heirs, executors, and assigns of my said daughter, for and according to all my estate and right therein respectively. Nevertheless, in case my said daughter shall intermarry and have no child or children, then the said estates and money in the funds shall belong to my son *George William Russen;* or in case of his decease before my said daughter, then to such child or children as he may happen to have;" and after enabling his daughter to grant leases of the freehold and leasehold estates so given to her, and giving certain other legacies, he gave all the residue of his estate to his son *George William Russen.*

By a codicil, the testator gave to his daughter, *Mary Ann Russen*, a further sum of 1000*l.* 3 per cent. reduced annuities, subject to the like terms and conditions as before mentioned and described in his will.

The testator died on the 6th of *February* 1819. He left his son *George William Russen* his heir at law and customary heir, and his daughter *Mary Ann Russen* surviving. The son *George William Russen* proved the will, and became legal personal representative.

On the 28th day of *November* 1820, an indenture of that date, and made between *Mary Ann Russen* of the one part, and *George William Russen* of the other part, was executed; and, thereby, after stating the will and codicil, and the death of the testator and probate of the will, it was recited that a messuage in *Golden Lane*, late in the occupation of Mrs. *Snell*, being part of the hereditaments devised by the will, having been condemned as ruinous, had been pulled down and rebuilt. And that, in order to pay for the rebuilding thereof, *Mary Ann Russen* had proposed and agreed that the 1000*l.* reduced annuities given by the codicil should be sold, and for

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for securing the replacing thereof, she agreed to assign the rents and profits of the freehold and leasehold estates, and the dividends of the stock given to her by the will, to *G. W. Russen* on the trust after mentioned. It was witnessed that she made such assignment, on trust that *George William Russen* should, out of the rents, dividends, and annual produce thereby assigned, effect a policy of insurance on the life of *Mary Ann Russen* for the sum of 1000*l.*, and apply the money to be recovered on the policy, and the residue of the rents and income, if he should think proper, in replacing the sum of 1000*l.* 3 per cent. reduced annuities, on the trusts of the will and codicil; and subject to the trusts thereby declared, *George William Russen* was to stand possessed of the trust monies aud premises, on trust for *Mary Ann Russen*, according to the terms and conditions of the will and codicil; and by the same deed *Mary Ann Russen* covenanted, that she would permit, and if necessary, join in selling the 1000*l.* 3 per cent. reduced annuities, for the purpose of paying for rebuilding the messuage pulled down; and that she would, on demand, replace the annuities in the name of *George William Russen*, or in the name of his executor.

George William Russen did not effect a policy on the whole life of his sister *Mary Ann Russen*, but for seven years only.

He died without issue, having made a will, dated the 28th *February* 1833, by the recital of which he shewed, that he considered himself interested in the property given to his sister by his father's will; and he made a general gift of his own property to his wife, under whom the Plaintiffs claim to be entitled.

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Mary Ann Russen married, and was now the Defendant *Mary Ann Noble*, but she had no child, and on behalf of the Plaintiffs it was contended,

1st, That *Mary Ann Noble* took a life interest only in the freehold and leasehold estates, and the two sums of stock bequeathed to her by the will and codicil of *David Russen;* and that having married, and having no child, *George William Russen* became, and those who claim under him now were, entitled absolutely to those estates and stocks, subject only to the life estate of *Mary Ann Noble*, and the contingency of her still having issue.

2dly, That although there was a gift of the copyhold, together with the freehold and leasehold estates to trustees, and the trusts for *Mary Ann Russen* were declared as to the freeholds and leaseholds; yet, that there was no such declaration of trust as to the copyholds, and consequently, that the same as to the beneficial interest therein descended to *George William Russen* as customary heir.

3dly, That *Mary Ann Noble* was bound by her covenant to replace the 1000*l.* 3 per cent. annuities, and that the rents of the freeholds and leaseholds devised to her, ought to be applied for that purpose.

On the other hand, it was contended by Mrs. *Noble*,

1st, That according to the true construction of the will, she took an absolute interest in the property devised and bequeathed to her, subject only to an executory devise over in the event of her marrying and having no child. That if she had never married, she would have had an absolute power over the property. That

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That in the event of her marriage, it was intended to protect her estate from her husband; and in the event of her having no child, to give the property over to her brother or his children surviving her; and that in the event which has happened, of her brother dying in her lifetime without children, she is now absolutely entitled.

2dly, That the omission of the word "copyhold" in the habendum, and in the declaration of trust, is an accident or mistake, against which the Court will relieve; and that *George William Russen* by his will and otherwise, admitted Mrs. *Noble* to be entitled to the copyholds under the will of *David Russen*.

3dly. That the 1000*l.* sought to be replaced, is in fact the property of Mrs. *Noble;* that if it were not so, *George William Russen* by neglecting to effect a proper policy, and apply the rents according to the trusts of the deed of *November* 1820, abandoned his claim to it.

Mr. *Tinney* and Mr. *Elderton*, for the Plaintiffs.

Mr. *Pemberton* and Mr. *Turner*, *contrà*.

Mr. *Tinney*, in reply.

Brounker v. *Bagot* (*a*), *Austen* v. *Taylor* (*b*), *Lynn* v. *Ashton* (*c*), and *Shelley's case* (*d*), were cited.

The MASTER *of the* ROLLS.

The first question is, what estate is given to Mrs. *Noble?* Is she entitled to an estate for life only, or to an

(*a*) 1 *Mer.* 271.
(*b*) *Ambler*, 376.
(*c*) 1 *Russ. & My.* 188.
(*d*) *Coke's Reports*, 93.

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an absolute estate, subject to be defeated by a contingent executory gift over? If the former, the Plaintiffs are entitled to the claim, which they have made in this respect. If the latter, it is to be considered, whether the event on which the executory gift over was to take effect, can now happen.

It is admitted on both sides, that Mrs. *Noble* has an equitable estate for life. During her life it is the office of the trustees, to preserve for her, the separate and independent use of the income; after her decease, it is the office of the trustees, to convey and assign all the testator's interest to her heirs, executors, administrators, or assigns. It is not the case of an equitable or trust estate for life, with a use executed in the heir, upon the death of the tenant for life; but a case, in which the trustees have a duty to perform, after, as well as before, the death of the tenant for life; and in which the duty after the death of the tenant for life, is clear and defined, neither requiring nor admitting of any modification. There would, on the death of the tenant for life, be nothing for this Court to do, but to direct the conveyance or assignment to the heirs, executors, administrators or assigns; and I think that upon the construction of this part of the will, independently of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators, and assigns; and that Mrs. *Noble* has an absolute estate, subject to be defeated by the executory gift over.

And if this be so, the question is, whether the particular event on which the vested estate was to be devested, can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion, that the gift over was

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was to take effect, only in the event of Mrs. *Noble*'s marrying and dying without issue, in the lifetime of her brother, or of such child or children as he might happen to leave; and as he died in her lifetime, and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in Mrs. *Noble* cannot now be devested.

With respect to the copyholds, although the testator gave them to the trustees, he has omitted to declare any trust of them; after the description of the subjects of his devise and bequest to the trustees, no further mention is made of copyholds. Even in the habendum to the trustees, he speaks only of the freehold and leasehold estates, and in the direction to convey and assign to the heirs and executors of Mrs. *Noble*, and in the power given to her to grant leases, he confines himself to the freehold and leasehold estates; and under these circumstances, I think that I cannot consider the copyholds as comprised in the trust. (*a*) The testator, *George William Russen*, however, under whom the Plaintiffs claim, has only disposed of the copyholds after the decease of Mrs. *Noble*, his customary heir, but subject to the right which descends upon her as customary heir, the Plaintiffs appear to me to be entitled to the copyholds.

The decision of the first point, disposes of the question as to the 1000*l.* 3 per cent. reduced annuities, which appear to me to belong to Mrs. *Noble*.

(*a*) See *Stubbs* v. *Sargon*, *antè*, p. 255. affirmed by L. C. *Jan.* 31st, 1838.

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March 16, 17.

ROGERS *v.* SOUTTEN.

An executor denied assets, but his answer disclosed a personal liability for payment of the Plaintiff's legacies. The Court made an order for immediate payment, without directing the accounts to be taken.

A testator became bound to the parish for the support of an illegitimate child of his son, and he made weekly payments until his death: Held, that he had placed himself *in loco parentis*, and that interest was payable from the testator's death, on a legacy given by him to the child, though made payable on attaining twenty-one.

WILLIAM BUCKLAND, the testator, by his will, dated the 1st of *March* 1821, "gave and bequeathed the sum of 50*l.* each, unto the two illegitimate children of which his deceased son was the putative father;" and he gave the residue and remainder of his property to the Defendant *Edward Soutten*, and appointed him his executor.

By a codicil to his will, dated the 11th of *August* 1821, the testator "gave unto each of the two putative children of his deceased son the sum of 50*l.*, in addition to a like sum given to them by his said will, and to be paid to them on their attaining the age of twenty-one years." The testator died in 1824, and the Defendant afterwards proved his will. The Plaintiff, *Susannah Rogers*, who was one of the illegitimate children of the testator's son referred to in his will and codicil, attained her age of twenty-one years in *March* 1831; and this bill was filed by her, to obtain payment of her two legacies of 50*l.*, and 50*l.* There were two questions argued at the bar; first, whether, under the circumstances stated in the judgment of the Master of the Rolls, and the Defendant having denied assets, an order for payment of the legacies could be made against the Defendant, without having the accounts of the testator's estate first taken; and, secondly, from what time interest was payable on the legacies.

Mr. *Pemberton* and Mr. *H. W. Busk*, for the Plaintiff, asked for an order for immediate payment of the legacies, without exposing the Plaintiff to the delay which would arise

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arise from taking the accounts before the Master. They contended that, although there was no admission by the executor of sufficient assets, yet that the facts stated in the answer shewed that he was personally liable to the Plaintiff for the payment of her legacies.

They contended also, that the testator having placed himself *in loco parentis* towards the Plaintiff, interest was payable on the legacies from the death of the testator.

Mr. *Cooper* and Mr. *Hill*, *contrà*, insisted that the accounts of the testator's estate ought to be taken in the Master's office previous to any order being made for payment to the Plaintiff. That, unless there was a clear admission of assets, it was not the practice of the Court to make any order for payment by an executor, until the preliminary inquiries had been completed.

Secondly, that interest was payable on the first legacy from one year from the testator's death; and on the second from the time of the legatee's attaining twenty-one.

Wetherby v. *Dixon* (*a*) and *Ellis* v. *Ellis* (*b*) were cited on the second point.

The MASTER *of the* ROLLS.

This is a bill filed for the payment of two legacies of 50*l.* each, given by the will and codicil of *William Buckland*, and dated respectively the 1st of *March* 1821 and the 11th of *August* 1821; one legacy of 50*l.* was given by the will and 50*l.* was given by the codicil, in addition

(*a*) 19 *Ves.* 407. *S. C. Coop.* 279. (*b*) 1 *Sch. & Lef.* 5.

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tion to the 50*l.* bequeathed by the will; and it is payable to the legatee on her attaining twenty-one. There were two questions raised in this case: first, whether the Defendant is, at this time, liable to an order for payment of the legacies, he having, by his answer, in terms, denied assets. Now it is true, that ordinarily, when a Defendant denies assets, the Court directs the accounts to be taken; but it does not follow that accounts are directed to be taken in those cases where, with the denial of assets, the answer discloses circumstances which shew a personal liability for what is asked. The question is, whether such circumstances exist in the present case. The testator, having given certain legacies by his will, gives to the Defendant, his executor, the residue of his personal and all his real estate. After the death of the testator, his will was disputed, and the Defendant then thought right, to enter into an agreement with the relations of the testator, who were disputing the will, for a compromise, which was of this nature: — That they should leave the Defendant in undisputed possession of, and with an unimpeachable title to the real estates; and that the Defendant should give to them all the personal estate, which is stated to have amounted to the sum of 2500*l.*; this they received, and the Defendant was left in possession, with a confirmed title to the real estates. Now the personal estate was subject to the payment of the testator's funeral and testamentary expenses, and his debts and legacies. The Defendant dealt with it as his own, for the purpose of procuring for himself, an indefeasible title to the real estate; but he could not thereby deprive the Plaintiff, or any person entitled, of any benefit or claim on the personal estate. It was, however, in 1826 when the Defendant thus used the personal estate as his own, for his own advantage, undertaking to pay the debts and funeral and testamentary expenses, but, as it is

is said, not the legacies: the transaction, however, took place under circumstances which could not, by possibility, defeat the claims of the legatees.

After this, he being in possession of the real estate, is called on for payment of legacy duty, which he pays even on the legacies in question; in the year 1830, and at various times, he pays the other legacies, and makes a compromise with another legatee, who was in the same situation as the present Plaintiff. After the lapse of some years, he is called upon for an account, and he renders one; and he says the debts are so much, and the personal estate so much, leaving a large balance more than sufficient to pay the Plaintiff: he does not however pay, because he says he has no assets; and for this reason, because he has given them to other persons, for the purpose of securing the real estates. He has truly denied, by his answer, that he has assets, for he has given them to other persons for the purposes I have stated. The question is, if this is such a denial of assets as to entitle the Defendant to have an account taken of the testator's estate; and I am clearly of opinion that he has precluded himself from any title to an account in this respect.

The next question is, from what time interest is payable on the legacies. If there are no peculiar circumstances, interest is payable from the expiration of one year from the death of the testator. As to the second legacy, it was to be paid in addition to a like sum which is given by the will.

It is said that the testator stood *in loco parentis*, or has assumed an obligation for maintaining the Plaintiff. I do not recollect any case in which the circumstances of the present have occurred. The son of the testator a very

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a very young man, who died soon after, at the age of twenty-one years, became the father of the Plaintiff, in consequence of which he was bound to indemnify the parish from any liability. He was not able to do it; and the testator, his father, stepped forward, and entered into a bond to maintain the child, and pay 3*s.* a week; and this obligation he seems to have performed during his life, with small exceptions. There were some arrears at his death, which were paid by the Defendant.

The testator, thus voluntarily assumed a duty, for the sake of relieving his son, the effect of which was to contribute so much for the Plaintiff's maintenance; and this was performed till his death; previous to his death, he had assumed the situation of one *in loco parentis;* and with this obligation pressing on him, he makes this provision for the children. The question is, whether this is not sufficient to extend the payment of interest on the legacies from one year after his death to the testator's death.

On the whole, I think there is sufficient to say, that interest ought to be paid from the death of the testator; therefore, let the interest be computed, and an order be made for the payment of the legacies, with interest, together with the costs of the suit.

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SMETHURST *v.* LONGWORTH.

1837.
Dec. 22.

The 1 *W.* 4. *c.* 47. does not empower the Court, even for the benefit of the infant heir, to direct a mortgage of his real estates for payment of the ancestor's debts to which it is liable.

BY the 1 *W.* 4. *c.* 47., for facilitating the payment of debts out of real estates, it is enacted by the eleventh section, that where any suit hath been, or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled in every such case, such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law), to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly, and every such conveyance shall be as valid and effectual to all intents and purposes, as if such person or persons being an infant or infants, was or were at the time of executing the same, of the full age of twenty-one years.

It had been ascertained in this case, that the personal estate of the deceased was insufficient for the payment of his debts; and an order had been made by the Court, for raising the deficiency out of the real estate, which had descended on an infant heir.

The Master, to whom the matter had been referred, reported, that it would be for the benefit of the infant, that

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that the money should be raised by a mortgage; but he doubted, whether a valid mortgage could be executed under the above act.

Mr. *Pemberton*, in support of the petition to confirm the report.

The MASTER *of the* ROLLS was of opinion, that the act did not authorise a mortgage; observing that the words sale or mortgage would naturally have occurred, if the Legislature had intended to authorise a mortgage of the infant's estate; and his Lordship referred it back to the Master to inquire what portion of the estate ought to be sold.

Dec. 9.

EVANS *v.* EVANS.

The Defendant having failed to appear at the hearing, the Plaintiff took such decree as he could abide by. It afterwards turned out, that the affidavit, of service of the *subpœna* to hear judgment, was defective; the Court refused to reinstate the cause, suggesting that the proper mode was to set it down again at the bottom of the list.

THE Defendant, in this case, made default in appearing at the hearing, and the Plaintiff took against him, such decree as he could abide by. It was afterwards discovered, that the affidavit of service of the *subpœna* to hear judgment, was irregular in its form, which prevented the decree being drawn up.

Mr. *Koe* now moved to reinstate the cause, alleging that the officers of the Court entertained great doubts as to what course ought to be pursued in such a case.

The MASTER *of the* ROLLS refused to make any order, stating, that the proper way would be to set down the cause again at the bottom of the list, and bring it on again in the usual way.

1837.

PARSONS *v.* ROBERTSON.

Nov. 2.

IN this case the bill was filed for the specific performance of an agreement entered into by the Defendants to take a lease. The Defendants, by their answer, admitted having in their possession a case for the opinion of counsel, and the letters, and copies of letters, stated in the schedule to their answer, which related to the matters in the bill mentioned, "however the Defendants said, that the aforesaid case or statement for the opinion of counsel, was prepared and submitted to counsel in contemplation of, or with reference to, or in the course of the suit, and that several of such letters, and copies of letters, were written subsequent to the institution of the suit; and they therefore submitted, that they ought not to be compelled to produce such case or statement, or any of such last-mentioned letters, or copies of letters," &c.

The Defendant by his answer, admitted that he had in his possession certain documents relating to the matters in question, but he stated that several of them were privileged. The Plaintiff having moved for the production of all the documents, the Court admitted an affidavit to be read on the part of the Defendant, specifying which of them were privileged.

Mr. *Rogers* now moved for the production of all the letters and documents stated in the schedule.

Mr. *Hayter*, *contrà*, resisted the production of the case and opinion, and the letters written by the Defendants to their solicitor subsequent to the institution of the suit; and he read an affidavit, specifying which of the letters came within that class.

Mr. *Rogers* opposed the reading of the affidavit, contending it was quite novel to permit a Defendant to explain his answer by an affidavit; but

The MASTER *of the* ROLLS said it was not novel, on such a motion, to introduce by affidavit something as a defence

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a defence against the order for the production of papers; and that the Defendants must not be deprived of the benefit of their protection by an accidental slip in their answer; he therefore ordered the production of all the documents except the case and opinion, and the letters of the Defendant to his solicitors, specified in the affidavit to have been written subsequent to the institution of the suit.

See *Hughes* v. *Biddulph*, 4 *Russ.* 190.

1838. *May* 10.

BALLARD *v.* CATLING.

An order to sue *in formâ pauperis*, is ineffectual until served; and the party obtaining it was held on that ground liable to pay *dives* costs.

MR. *W. C. L. KEENE*, on a former day, moved to dismiss the bill for want of prosecution.

Mr. *Chitty*, for the Plaintiff, undertook to speed, and as a defence against the costs, he stated that the Plaintiff had obtained an order to sue *in formâ pauperis*. This point being contested, the case stood over, and on inquiry it was afterwards found that the order had not been served.

Mr. *W. C. L. Keene*, on this day, applied for the costs of the motion, on the ground that the order obtained *ex parte* was a nullity until served.

The MASTER *of the* ROLLS on that ground, held that the Defendant was entitled to the costs.

1838.

CANE *v.* MARTIN.

May 24.

A suit was commenced previous to the orders of 1837. A Defendant afterwards filed a demurrer, and set it down at the Rolls: Held, that the Orders of 1837 did not give to the Plaintiff such a right of selecting his Court, as to render the proceedings of the Defendant irregular.

THIS bill had been filed previous to the orders of of 1837 coming into operation, but no special order on merits had been made therein.

One of the Defendants had lately filed a demurrer to the bill, and set it down at the Rolls.

Mr. *Elderton*, on behalf of the Plaintiff, now moved to discharge that order for irregularity, and to take the demurrer off the file, contending, that if the demurrer were heard at the Rolls, it would prevent the Plaintiff setting down his cause to be heard before the Vice-Chancellor; and that it was not intended by the new orders to take away from the Plaintiff his right of electing. That the Defendant ought, therefore, to have applied to the Plaintiff, to elect in which Court he would have his cause heard; and in default, the Defendant might have then applied to the Court.

Mr. *Pemberton*, for the Defendant, was not called on by

The Master *of the* Rolls, who said he did not see any reason for discharging the order; the case was the same as before the new orders came into operation, when the Defendant might set down the demurrer in whichever Court he pleased. The new orders did not affect that right; but merely ordered, that when the case had been once heard on demurrer, or on the merits, a party should not afterwards be at liberty to carry the cause to another Judge, who was unacquainted with the circumstances of the case.

1838.

April 19.

WHITFIED *v.* PRICKETT.

Held that a bequest, subject to a clause of forfeiture, in case the legatee should mortgage, charge, sell, or expose to sale, assign, or incumber, was not forfeited by the bankruptcy of the legatee.

IT appeared that the testator bequeathed a sum of 1700*l.* long annuities to trustees, in trust to pay the interest to the testator's nephews and nieces in certain proportions during their natural lives, with benefit of survivorship, and the testator by his will declared as follows: — "That the respective half yearly payments of the said annuities, should from time to time be made, into the hands of his said nephews and nieces respectively, and that their own respective receipts, should be a discharge to his said trustees for the same; and that his said nephews and nieces, should not have power to mortgage, charge, sell, or expose to sale, assign, or incumber their respective portions of the said annuities, or any of the half yearly payments thereof respectively; nor to direct the payment thereof to any other person, nor to give any receipt or discharge for the same by anticipation, or before the payment for which such receipt or discharge should be given should have accrued due; and in case any or either of them, his said nephews or nieces, *should mortgage, charge, sell, or expose to sale, assign, or incumber* the annuity, share, or other interest accruing to him, her, or them respectively, by virtue of his said will or the trust therein declared, or any of the half yearly payments thereof; or direct the payment to any other person, or give any receipt for the same by anticipation, before the payment for which such receipt was given should have accrued due; then the said testator directed, that the annuity, share, and interest therein-before given to or in trust for such of them as should act contrary to the direction therein-before contained, should from thenceforth cease and be no longer payable to

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to him, her, or them; but that the same should thereupon and thenceforth be payable to his, her, or their child or children respectively, if any such there should then be, or to his nephews and nieces and their children, in such manner, shares, and proportions, as the same would then be payable or distributable, if the annuitant or annuitants respectively so acting were then dead; and he gave, bequeathed, and directed the same to be held in trust accordingly.

One of the children became bankrupt, and the question was, whether the subsequent dividends were payable to his assignees or to the other legatees.

Mr. *Spence* contended that the life interest was payable to the assignees; he cited *Lear* v. *Leggett.* (*a*)

Mr. *Lloyd*, for the other legatees, insisted that a forfeiture had been committed, and that the gift over had taken effect; he cited *Cooper* v. *Wyatt.* (*b*)

Mr. *Abraham* in the same interest.

The MASTER *of the* ROLLS held, that as the bankruptcy was an act of law, and not a voluntary assignment by the legatee, which alone was contemplated by the will, the assignees were entitled.

(*a*) 2 *Sim.* 479. *S. C.* 1 *R. & Myl.* 690.

(*b*) 5 *Madd.* 482.

1838.

Feb. 28.
April 6.

FISHER *v.* FISHER.

A testator devised his freehold, customary freehold, copyhold, and leasehold estates for the benefit of his seven children; and he gave his remaining personal estate to *A.*, exonerated from his debts; and he declared that his freehold, customary freehold, and copyhold estates, should be the primary fund, and that his leaseholds should be the secondary fund, for the payment of his debts. *Joseph*, one of the children, died in the testator's lifetime, whereby his share lapsed: Held, as between the heir at law, and the next of kin of *Joseph*, and the residuary devisees, and legatee under the will of the testator, that the share intended for *Joseph* of the freehold, copyhold, and leasehold estate, was to be applied in the same order and manner, and to the same extent, as if *Joseph* had survived, and that the heir and next of kin of *Joseph*, were respectively entitled to what remained after such application.

THE object of this suit was to have a declaration of the rights of the parties interested under the will of the testator *Robert Fisher;* and the principal question in the cause was, in what order the assets of the testator were to be applied in payment of his debts.

The will of the testator was dated the 13th day of *January* 1824, and thereby, after giving certain annuities to three granddaughters, the testator devised his messuages, lands, tenements, and hereditaments, wherein he had any estate of inheritance as of freehold, and whether freehold, customary freehold, or copyhold, as to six undivided seventh parts thereof, to the use of his children, *Jabez*, *Robert*, *Joseph*, *Roger*, *Samuel*, and *Elizabeth*, as tenants in common in fee; and as to the remaining seventh part thereof, to the use of his daughter *Elizabeth*, in trust for his son *Josiah* for his life, but after his death for herself. And the testator empowered his executors, notwithstanding the preceding devises, to sell so much of his freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments as they should deem necessary to be sold, for payment, not only of the costs of the sale, but also of his just debts and funeral and testamentary charges and expenses; and he directed that the money so raised should be applied in payment of such debts, and funeral and testamentary expenses accordingly; and he provided

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provided, that so much of the money, as should not be wanted for paying his debts, funeral and testamentary expenses, and costs of sale, should go and belong to, and be divided amongst, the persons, and in the manner, and for the respective interests, to and amongst whom, and in and for which, his freehold, customary freehold, and copyhold hereditaments not sold as aforesaid, should go, accrue, belong, and be divided under the preceding devises and limitations; and then he gave his leasehold estates for all his interest therein, as to six seventh parts thereof, to his children *Jabez*, *Robert*, *Joseph*, *Roger*, *Samuel*, and *Elizabeth*, in equal shares, as tenants in common. And as to the remaining seventh part thereof, to *Elizabeth*, subject to a trust for *Josiah*, during his life. The testator then gave to his daughter *Elizabeth*, absolutely, all his ready money, securities, goods, chattels, rights, credits, and personal estates (except his leasehold messuages, chambers, lands, and tenements), freed, exonerated, and discharged of and from his debts and funeral and testamentary expenses; and he afterwards expressed himself as follows: — "I do hereby subject and charge my freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments, as the primary fund, to and with the payment of my just debts and funeral and testamentary expenses; and I declare that my said leasehold messuages, lands, tenements, and chambers, shall be the second or auxiliary fund, for the payment of my debts and funeral and testamentary expenses."

The testator's son *Jabez* having died, he made a codicil, dated the 4th of *August* 1830, and thereby gave to his daughter *Elizabeth* the share of his property, which *Jabez*, if he had lived, would have been entitled to.

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The son *Joseph* died in *January* 1835, and the testator died in the month of *June* next following, without having made any further alteration of his will.

The consequence was, that the share of his property given to *Joseph* lapsed, and his share of the freeholds and copyholds descended to the testator's heir at law, or customary heir, and his share of the leaseholds to the testator's next of kin.

It was argued for the Plaintiff and others of the devisees under the will, that the lapsed share of *Joseph* was the fund first applicable to the payment of the testator's debts; that the law exempted the devisees and legatees, who were objects of the testator's bounty, at the charge of the heirs and next of kin, who were not objects of his bounty: and that the lapsed share must exonerate the shares effectually given. It was contended, by those interested in the lapsed personal estate, that the descended real estate was the fund first applicable to the payment of debts; and the parties interested in the descended real estate insisted that the lapsed share of the leasehold should be first applied.

On the other hand, it was contended, that the freeholds, customary freeholds, and copyholds ought to be first applied in payment of the debts, and funeral and testamentary expenses; and that no part of the leaseholds ought to be so applied, if the freeholds and copyholds were sufficient; and that nothing had lapsed but the share of the surplus of the real estate or of the leaseholds, which might remain after payment of the debts, funeral and testamentary expenses.

Mr. *Pemberton* and Mr. *G. L. Russell*, for the Plaintiff, *Roger Fisher*.

Mr.

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Mr. *Bethell*, Mr. *L. Lowndes*, Mr. *Koe*, and Mr. *H. E. Sharpe*, for other parties.

The cases relied on were *Galton* v. *Hancock* (*a*), *Barnewell* v. *Lord Cawdor* (*b*), *Donne* v. *Lewis* (*c*), *Milnes* v. *Slater* (*d*), *Williams* v. *Chitty* (*e*), *Hale* v. *Cox* (*g*), *Waring* v. *Ward* (*h*), *Manning* v. *Spooner*. (*i*)

Mr. *Pemberton* in reply.

The MASTER *of the* ROLLS, after stating the circumstances of the case, proceeded: —

Now, upon the construction of this will, in which the testator has expressly exonerated his personal estate (other than leasehold lands and tenements) from the payment of debts; and expressly subjected his freehold, customary, and copyhold estates as the primary fund; and declared his leasehold estates to be the secondary or auxiliary fund for the payment of his debts and funeral and testamentary expenses; I think, that the testator must be considered to have appropriated, first his freehold, customary freehold, and copyhold estates; and, secondly, his leasehold estates, as the special fund for the payment of his debts, and funeral and testamentary expenses: that *Joseph*, if he had lived, would only have been entitled to his share of so much of the freehold, customary freehold, and copyhold estates, as remained after payment of the funeral and testamentary expenses and debts; or in the event of the whole being insufficient for that purpose, to his share of so much of the leasehold estate, as remained after payment of the debts,

(*a*) 2 *Atk.* 424. 427. 430.
(*b*) 3 *Mad.* 453.
(*c*) 2 *Bro. C. C.* 257.
(*d*) 8 *Ves.* 293.
(*e*) 3 *Ves.* 545.
(*g*) 3 *Bro. C. C.* 322.
(*h*) 5 *Ves.* 670.
(*i*) 3 *Ves.* 114.

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debts, and funeral and testamentary expenses, remaining unsatisfied, after the application of the primary fund; and that nothing has lapsed, but the shares of the respective estates which *Joseph* would have been entitled to.

I am therefore of opinion, that the debts and funeral and testamentary expenses, are primarily charged upon, and ought to be borne by, the freehold, customary, and copyhold estates; and that if such estates be more than sufficient for full payment of the debts and funeral and testamentary expenses, one seventh part thereof, in consequence of the death of *Joseph* in the lifetime of the said testator, is undisposed of by the will, and has descended to the testator's heir at law, and customary or copyhold heir; and that if the freehold, customary, and copyhold estates, be insufficient for payment of the debts, and funeral and testamentary expenses, the deficiency is to be raised out of the testator's leasehold estate; and that one seventh part of the leaseholds, or of the surplus thereof, after payment of such deficiency, has lapsed, in consequence of the death of *Joseph* in the lifetime of the testator, and is undisposed of by the will.

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Jan. 24. 26. 29
April 23.

A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died without issue, the two nephews to inherit from the brother; and he then stated, that the reason why he left only the interest to his brother and two nephews was, that if they died without issue, the money might go to his three cousins, he desired his legatees to be paid within twelve months, and proceeded, "it is to be understood I leave it to them and their heirs;" the brother and nephews died without issue: Held, that, under the will, the brother took an annuity for life only, and was not interested in the fund set apart to answer the annuity of 300*l.*

THE object of this suit was to have it ascertained who was entitled to the sum of 10,000*l.* 3 per cent. annuities, set apart to answer an annuity of 300*l.*, given by the will of *Zachariah Agace*.

Zachariah Agace, the testator in this cause, made his will, dated the 3d day of *November* 1775; and thereby, after bequeathing certain legacies, expressed himself as follows: — "I give and bequeath to my brother *Jacob Agace* 1000*l.*; I give and bequeath a further sum to my brother *Jacob Agace*, during his life, 300*l.* per annum; I give and bequeath to my nephew *Zachariah Agace*, during his natural life, 150*l.* per annum; I give and bequeath to my nephew *Daniel Agace*, during his natural life, 150*l.* per annum: and in case either of my nephews should die, the other to inherit the whole 300*l*; and if my brother *Jacob Agace* dies without issue, then my two nephews *Zachariah Agace* and *Daniel Agace* to inherit from my brother *Jacob Agace*. I also give and bequeath to my aunt *Mary Agace*, 25*l.* per annum; I also give and bequeath to Mrs. *Temperance Cole* 25*l.* per annum. These last legacies are only for life; then to my dear wife. The reason why I leave only the interest to my brother *Jacob* and my two nephews is, that if they die without issue, the money may go to my relations, to be divided between my cousins *James Legrew*, Mrs. *Susan Godard*, widow of *John Godard*, and Mrs. *Esther Privo*, wife of Mr. *Nicholas Sebire*, three shares equally alike. I desire also my legatees should be paid within the twelve months after my

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my decease, if convenient, or as soon as you can. It is to be understood, what I leave is to them and their heirs." And after bequeathing other legacies, he gave the residue of his estate to his wife.

The testator died in *March* 1778, and his will was proved by his brothers *Obadiah* and *Jacob*, and by *Peter Wallis*, his widow *Martha*, and his nephews *Zachariah* and *Daniel*.

The brother *Jacob* died without issue in *March* 1782, having made a will, whereby he gave the residue of his estate to his widow *Esther;* and he appointed her, together with his nephews *Zachariah* and *Daniel*, and his brother *Obadiah*, executrix and executors.

Jacob enjoyed the 300*l.* per annum given to him during his life. After his death it was enjoyed by his nephews *Zachariah* and *Daniel*.

Martha, the widow and residuary legatee of *Zachariah*, the first testator, died in *May* 1786, having made a will, whereby she gave the residue of her estate to *Daniel Agace*, the nephew, and she appointed him and *Peter Wallis* her executors.

Esther, the residuary legatee of *Jacob Agace*, died sometime after the 8th of *August* 1803, having made a will of that date, whereof she appointed *George Legrand*, and the Defendants *George Wren Legrand* and *John Lepine* executors.

Zachariah Agace the younger died without issue, and after his death, *Daniel*, the surviving nephew, enjoyed an annuity of 600*l.*; consisting of the 150*l.* first given to himself, the 300*l.* a year first given to *Jacob*, and the 150*l.* a year first given to *Zachariah* the younger; and *Obadiah*

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Obadiah Agace and *Peter Wallis* having both of them died in the lifetime of *Daniel*, he became the sole legal personal representative of *Zachariah*, the first testator, of *Jacob* the brother, and of *Martha*, the residuary legatee.

In *April* 1828 *Daniel* died without issue, having made a will, whereby he gave the residue of his estate to the Plaintiff, and appointed the Defendants *John Griffin*, *Daniel Ferard*, and *Andrew Amos*, his executors.

The Plaintiff, therefore, as residuary legatee of *Daniel*, who was residuary legatee of *Martha*, the widow and residuary legatee of *Zachariah*, the first testator, claims to be entitled to the residue of *Zachariah*'s estate.

And the Defendants *George Wren Legrand* and *John Lepine*, as executors of *Esther*, the widow and residuary legatee of *Jacob*, claim to be entitled to the residue of *Jacob*'s estate.

The contest related to the title to the sum of 10,000*l.* 3 per cent. consols, set apart to answer the annual payment of 300*l.* made to *Jacob* during his life; to *Zachariah* the younger, and *Daniel*, during their joint lives, after the death of *Jacob*; and to *Daniel* alone, after the death of *Zachariah* the younger.

The Plaintiff claimed to be entitled to this money as part of the residuary estate of *Zachariah*, the first testator, or in part of the residuary estate of *Daniel*, the nephew. The Defendants *Legrand* and *Lepine* claimed to be entitled to the same sum as part of the residuary estate of *Jacob*, on the ground, that according to the true construction of the will, *Jacob* was entitled absolutely

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solutely to a capital sum sufficient to produce 300*l.* a year, and not merely entitled for life to the annual sum of 300*l.*; arguing that there was a gift for life to *Jacob Agace*, with an implied remainder to his issue, which was equivalent to an absolute gift of personalty.

It will be seen from the case of *Lepine* v. *Ferard* (*a*), which related to the construction of the will of the testator, the 20,000*l.* was claimed by the representatives of the testator's cousins, *James Legrew*, &c.; but it was held first by Sir *J. Leach*, and afterwards, on appeal, by Lord *Brougham*, that the gift over to them was void, being too remote, or in other words, that it was a gift after an indefinite failure of issue. In that case, Lord *Brougham*, in delivering judgment, adverted to the point raised, — he said, "It is not necessary for the present purpose to decide, and it was not necessary for the Defendants to argue the question, whether the nephews took mere life estates, or whether they took absolute interests, although, looking to the wording of the clause in which the testator assigns the reason for the peculiar form of his gift, the words seem to import a general failure of issue, and strongly favour the opinion that they took absolute interests."

Mr. *Pemberton*, Mr. *Temple*, and Mr. *Stuart*, for the Plaintiff.

Mr. *Tinney*, Mr. *Coote*, and Mr. *Paynter*, for the Defendant *Lepine*.

Glover v. *Strothoff* (*b*), *Wilkinson* v. *South* (*c*), *Tissen* v. *Tissen* (*d*), *Gawler* v. *Cadby* (*e*), *Trotter* v. *Oswald* (*g*), *Massey*

(*a*) 2 *R. & M.* 378.
(*b*) 2 *Bro. C. C.* 33.
(*c*) 7 *T. R.* 555.
(*d*) 1 *P. Wms.* 500.
(*e*) *Jacob*, 346.
(*g*) 1 *Cox*, 317.

Massey v. *Hudson* (*a*), and *Doe dem. Lyde* v. *Lyde* (*b*), were cited.

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The question, in the first instance, is simply a question of construction; for if *Jacob* was entitled to a life annuity, the Plaintiff is entitled to the fund; and if *Jacob* was entitled to an absolute interest, the Defendants *Legrand* and *Lepine* would be entitled; though in that case the Plaintiff insists that the length of time which has elapsed debars them from making their title available.

It was argued for the Defendants, that the words, "I give and bequeath a further sum to my brother *Jacob* during his life, 300*l.* per annum," in which the gift to *Jacob* was expressed, entitled him to require the executors to invest on proper securities a sufficient sum to produce an annual sum of 300*l.*; and that the effect of the same words, and other words contained in the will, is the same as if the testator had first bequeathed such principal sum as would produce an annual interest of 300*l.* to *Jacob* for his life, and had afterwards enlarged that limited interest in the principal sum to an absolute estate. It must be admitted that *Jacob* was entitled to have a sufficient part of the testator's estate invested to secure the due payment of his annuity; but when the testator, after giving 1000*l.* absolutely, gives a further sum to *Jacob* for his life, and describes that further sum as 300*l.* per annum, I think that the words only import an annuity or annual sum for life, and that their meaning, or legal operation, is in no way affected, by the mode in which the executors were bound to provide for the

(*a*) 2 *Mer.* 130. (*b*) 1 *T. R.* 593.

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the secure payment of the annuity; either in pursuance of the rules established by this Court, or for the purpose of providing for other interests, given to other parties by the will. It was the duty of the executors, having assets, to purchase 10,000*l.* 3 per cent. annuities, to secure the annuity; but the gift to *Jacob* was only a gift of the annual sum of 300*l.* for his life, and how that part of the testator's estate, which was to be invested to secure payment of the annuity, was intended to be disposed of, is to be collected from other parts of the will. The next gifts are of annuities of 150*l.* each to the testator's nephews *Zachariah* and *Daniel* for life; and to the words expressing these gifts, the testator adds, "in case either of my nephews should die, the other to inherit the whole 300*l.*;" and it may be observed, that in this place the gifts to the nephews, being of annual sums for life only, and there being no words here used, which can in any way affect that limited interest, the testator would seem to employ the word "inherit," to express immediate succession, and to mean, that on the death of either nephew, his annuity was to be inherited by, or to go immediately to the other. The testator then proceeds: "If my brother *Jacob* dies without issue, then my two nephews are to inherit from my brother *Jacob*;" and I think it probable, that in this case, the word "inherit" is used as it was before, to express immediate succession; and the effect of the will, up to the words I have last read, if unaffected by subsequent words, would appear to me to give to the brother *Jacob*, and to the nephews *Zachariah* and *Daniel*, annuities for life of 300*l.*, 150*l.*, and 150*l.*, with a limitation of *Jacob*'s annuity to *Zachariah* and *Daniel* for life, if *Jacob* should die without issue living at his death. The testator afterwards says, "The reason why I leave only the interest to my brother *Jacob*, and my two nephews is, that if they die without issue, the money may go to my

my relations, to be divided between my cousins." This gift over, has been declared to be too remote; but the words in which it is expressed, shew that in the previous parts of the will, the testator had only intended to give an interest or annuity for life; and although the word "money," used in this place, must I think be taken to signify the money invested to produce the annuities, yet it appears clear, that no gift of such money was intended, or made, in the former part of the will, except as there may have been a gift of it by implication, to the issue of *Jacob*.

From the words "dying without issue," which in this clause, are used with reference to *Zachariah* and *Daniel*, as well as to *Jacob*, it appears that the testator intended what he calls "the money," or as I conceive, the part of his estate invested to produce the annuity, to go to the issue of *Zachariah* or *Daniel;* and as the gift over of the 300*l.* a year, after the death of *Jacob* without issue, is not a mere gift of the annuity to *Zachariah* and *Daniel* for life, but is followed by gifts implied and direct of the principal money, of which the annuity was to be the interest; the question as to the remoteness of the gifts to *Zachariah* and *Daniel*, arises upon the will, but it does not appear to me to be necessary to decide it on this occasion. I am of opinion, that upon the true construction of this will, whether the gifts to *Zachariah* or *Daniel* were too remote or not, *Jacob* was entitled to a life interest only in the annual sum of 300*l.*; that he was not entitled to any interest in the capital sum, which the executors invested to produce the annuity; and that, in the events which have happened, the Plaintiff is entitled to that sum.

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July 21.
Aug. 7.

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A power of appointing a fund between *A. B.* and *C.* is well executed by an appointment between *A. B.* and the husband of *C.*; but an appointment to such husband of a share of the fund, after deducting therefrom a debt due to the appointor, is an invalid execution of the power so far as regards the direction to deduct.

A power to appoint among children, "subject to such regulations and directions, with regard to the settling the shares in trust for their separate use, and with, under, and subject to such powers, provisos, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them)," does not authorise an appointment to grandchildren.

A., widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children for life, with remainder to their children; and in case any of her children died in her lifetime, she gave the share to his or her issue; and in case there should be no issue, the survivors of *A.*'s children were to take: Held, that the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid.

IN this case, by an indenture bearing date the 3d o *March* 1799, certain funds were vested in trustees upon trust for *Jane Webb*, widow, and her assigns for life; and from and immediately after her decease, upon this further trust, — that the trustees, should pay and transfer the same "unto, between, and amongst *Richard Webb*, *Elizabeth Webb*, and *Jane Webb* the daughter, *Ann Fletcher*, *Mary Webb*, and *Fanny Webb*, at such time and times, and in such parts, shares, and proportions, and manners, *and subject to such regulations and directions with regard to the settling the shares* of the said *Elizabeth Webb*, *Jane Webb* the daughter, *Ann Fletcher*, *Mary Webb*, and *Fanny Webb*, or the share of any of them, in trust for their respective separate use, independently of their respective husbands, and with, under, and subject to such powers, provisos, conditions, and other restrictions and limitations over, (such limitations over being for the benefit of some or one of them), and with or without power of revocation and new appointment, as the said *Jane Webb* the widow, at any time or times, by any deed or deeds, writing or writings, to be by her sealed and delivered, in the presence of, and to be attested by, two or more credible witnesses, or by her

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her last will and testament in writing, or any codicil thereto, to be by her signed and published, in the presence of the same number of witnesses, should direct, limit, appoint, or give and bequeath the same; and in default of some such direction, limitation, appointment, or gift or bequest, and as to such part and so much of the said moiety, whereof no such direction, limitation, or appointment should be made as aforesaid, in trust that the trustees should pay and transfer the same trust funds, or so much thereof of which no such direction or appointment should be made, unto, between, or amongst the said *Richard Webb*, *Elizabeth Webb*, *Jane Webb* the daughter, *Ann Webb*, and *Fanny Webb*, equally to be divided amongst them, share and share alike as tenants in common, and not as joint tenants.

Before the date of the will of *Jane Webb* the widow, *Jane Webb*, her daughter, became the wife of *Samuel Roberts*, *Mary Webb* became the wife of the Plaintiff *Charles Hewitt*, and Defendant *Fanny Webb* became the wife of *John Bradley*.

Jane Webb the widow, by her will, dated the 30th of *September* 1826, after reciting as follows: "And whereas, in or before the year 1820, I lent and advanced to my son-in-law *Charles Hewitt* (meaning thereby the Plaintiff, the husband of *Mary*) the sum of 500*l*., and he is indebted to me in that sum, upon his promissory note payable on demand; and whereas I have lately lent unto my son-in-law *John Bradley* (meaning the husband of *Fanny*) the sum of 350*l*., and he is indebted to me in that sum, upon his promissory note payable on demand: and whereas my son *Richard Webb* hath, at my request, also lent unto the said *John Bradley* the further sum of 150*l*., upon his promissory note, payable on demand,"—

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mand,"—she, then in execution of her power, appointed the trust property, and proceeded as follows: "And I also give and bequeath all the said stock so standing in my own name, or to which I may be entitled at the time of my decease, together with the said debt so due and owing from the said *Charles Hewitt*, and the said debt so due and owing from the said *John Bradley*, unto my son *Richard Webb*, and to my friend *Thomas White*, in trust that they do pay unto the said *Charles Hewitt*, as the husband of my daughter *Mary*, one sixth part of the whole thereof, after deducting therefrom the said debt of 500*l.*, so due and owing from the said *Charles Hewitt* to me as aforesaid, it being my intention that the said 500*l.* be deducted, and go in liquidation and reduction of his or her share of such stock, provided the said *Charles Hewitt* shall not repay the same before my decease; and I direct, upon such deduction and payment, the said note be delivered up to be cancelled; and that the said *Richard Webb* and *Thomas White* do pay unto the said *John Bradley*, as the husband of my daughter *Frances* or *Fanny*, one other sixth part of the same, after in like manner deducting therefrom and thereout the said debt of 350*l.* so due and owing from the said *John Bradley* to me; and after paying, retaining, and satisfying to my said son *Richard Webb*, the said debt of 150*l.* so due and owing from the said *John Bradley* to the said *Richard Webb*, provided the said *John Bradley* shall not pay and satisfy the said two debts before my decease; and that thereupon, the said two notes be delivered up and cancelled; and as to the remaining four sixth parts thereof, that they the said *Richard Webb* and *Thomas White*, do transfer, or cause and procure to be transferred, into the name of my said son *Richard Webb* one of such sixth parts to his own sole use and benefit, which I hereby give and bequeath unto

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unto him; and as to the three remaining sixth parts, that they do transfer the same, or cause and procure to be transferred, and retain the same in their own joint names at the bank, and do pay the dividends arising therefrom half yearly, into the hands of my daughters, *Elizabeth Jane*, the wife of *Samuel Roberts*, and *Anne*, the wife of *James Fletcher*, during the lives of the said *Elizabeth Jane* and *Anne*, to their own sole and separate use, in equal shares, share and share alike:" and the testator afterwards directed, that "after the death of either of her said daughters, the trustees should apply the dividends, or the share of such of her daughters dying, in the maintenance and education of such child or children as she might leave, till twenty-one; and then, as such child or children arrived at that age, to pay or transfer the principal stock, or share of such her daughter so dying, to and amongst her children, share and share alike; and if there should be but one, to such only child; and if there should be no child who should live to the age of twenty-one, nor any who should leave lawful issue, the testatrix gave the principal stock to such of her own children as should be then living, and the issue of such of them as might be then dead, such issue to take the share of the parent only. And in case any of the testatrix's said children should happen to die before her, she gave the share of him or her so dying, unto his or her lawful issue, each taking the share of the parent only; and in case there should be no such issue. the survivors or survivor of the testatrix's own children to take."

After the date of the will, and in the life of the testatrix (namely, in *July* 1833), *Ann Fletcher* died, leaving two children, who were parties to this suit; and in *July* 1835, in the lifetime of the testatrix, *Elizabeth Webb* died

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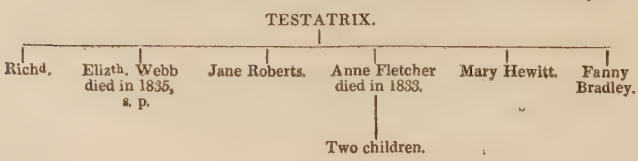
died without having been married.* On the death of the testatrix, in 1836, several questions were raised as to the validity of the appointment; first, whether the appointments to the husbands of the testatrix's daughters, who were not objects of the power, — viz., to *Charles Hewitt* and *John Bradley*, were valid executions of the power reserved to the testatrix; and if the direction to deduct the debts invalidated the appointment. Whether the appointment to the children of *Anne Fletcher* was a good execution of the power: and as to the share intended for *Elizabeth*, who died in the lifetime of the testatrix, without having been married, whether it had been effectively limited over by the will of the testatrix to her surviving children.

Mr. *Tinney*, Mr. *Pemberton*, and Mr. *James Russell*, for the Plaintiffs, contended, that the appointment to the husbands was a substantial and valid execution of the power: that if the appointment had been made directly to the wife, the husband would have been entitled thereto in his marital right. In *Bristow* v. *Warde*(*a*), a father having a power to appoint to his children, appointed 1000*l.* to his daughter, in trust to pay the dividends to her husband for life; and, after his decease, in trust to pay the dividends to the daughter for her life, in case she should survive her husband: Lord *Rosslyn* there observed (p. 349.), that "if he had given to the wife for life, and in case the husband should survive, to the

(*a*) 2 *Ves.* jun. 336.

* The following pedigree will explain the state of the family: —



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the husband, that would have been a substantial gift to the wife, — for it is admitted a gift for life is sufficient. He has done the same thing; for the husband would in that case in point of law have taken during the life of the wife: the insertion of the name of the husband, prior to that of the wife, is doing no more than if he had given to the wife first. The intention, therefore, not being to illude, but to give in effect such estate as a married woman could take, viz., for the benefit of the husband as long as the coverture should continue, it is not illusory: and Lord *Rosslyn* concluded "that there was no defect in the appointment to vitiate the whole."

They next argued, that the direction to deduct the debt of *Charles Hewitt* from the one sixth of the trust-fund was void, it being an appointment, in effect, for the benefit of the testatrix's estate, which the power did not authorise; but they contended that such direction did not vitiate the appointment, which remained valid; though the condition must be rejected. In *Burleigh* v. *Pearson* (*a*), a father having a power to appoint amongst his children, appointed 50*l.* to be paid to *Finlay* who had married one daughter, "in satisfaction of a bond of 50*l.* which he owed, and for which the elder son was joined in security: Lord *Hardwicke* said, it is true that a father having such a power cannot, unless he has a power to annex a condition, restrain a child's share to the payment of a particular debt, for there may be a defence to that debt:" but then he added, "Not that I say the Court might not hold the execution good, and the condition void."

They contended, also, that the appointment to the grandchildren of the testatrix, who were not objects of the power, was void (*b*); and that as to the share given to

(*a*) 1 *Ves.* sen. 281. (*b*) See cases, 2 *Sug. Pow.* 273.

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to *Elizabeth Webb*, who died unmarried, for life, that although the limitation to her children was invalid, yet that the direction that her brothers and sisters should take, in the event of her having no issue, was in the nature of an alternative gift, which in the events which had happened took effect.

Mr. *Kindersley* and Mr. *Bailey*, for Mr. and Mrs. *Bradley*, argued that the appointment to the husbands was good, but that the condition was bad; *Alexander* v. *Alexander* (*a*): and that as to the limitation over, in the event of any of the children of the testatrix dying without issue in her lifetime, it was an appointment with a double aspect; and although void as to the grandchildren, it was valid as to the gift over to the surviving children who were objects of the power; *Crompe* v. *Barrow*. (*b*)

Mr. *Roupell*, for the children of *Ann Fletcher*, argued, that as the power authorised *the settlement* of the shares of the children, the appointment to the grandchildren was authorised. In *Cavendish* v. *Cavendish* (*c*), Lady *Burlington* devised to the late Duke of *Devonshire* for life, and, after his decease, to the use of his children, for such estates, and in such shares and proportions, and subject to such powers, provisions, conditions, restrictions, and limitations as he, by deed or will should appoint; he by will devised the premises to the younger sons, in strict settlement; and this was held a good execution of the power. In *Mallison* v. *Andrews* (*d*), a power was given to a *feme covert* to dispose by deed or will of 1300*l.* to such of her children, in such manner and form, and to such uses and purposes, as she should appoint: she gave

(*a*) 2 *Ves.* sen. 640.
(*b*) 4 *Ves.* 681.
(*c*) 2 *Bro. C. C.* 25. n.
(*d*) *Ibid.* p. 27. n.

gave 400*l.* to *R.* absolutely; 400*l.* to *E.*, at twenty-one; and 500*l.* to *P.*, that is, the interest and dividends to *P.* for life; and after her decease, the principal to be divided among her children. Under the very full words of this power the appointment was held to be well made. He referred also to *Griffith* v. *Harrison.* (*a*)

Mr. *Cole*, for the personal representative of *Ann Fletcher*, insisted that the appointment to the husbands of the daughters was void; that the effect was not, as was argued on the other side, to give the husbands the same interest as if the appointment had been made absolutely to the wife; for in such case the husband would have taken subject to the wife's equitable right to a settlement. (*b*)

Suppose the husband had died in the lifetime of the wife, the appointment to her would have failed. This shews that the appointment was not in effect an appointment to the wife.

He contended that the gift over of *Elizabeth*'s share was not an appointment with a double aspect, but a remainder over, after a void gift to her issue, which was not accelerated by the failure of the prior void gift; he cited *Routledge* v. *Dorril.* (*c*)

Mr. *Chandless*, for *Jane Roberts* and her husband.

Mr. *Kenyon Parker*, for the personal representatives of the testatrix.

Mr. *Mylne*, for Lord *Dacre.*

Mr.

(*a*) 3 *Bro. C. C.* 410.
(*b*) See remarks in 2 *Sugden Pow.* 297.
(*c*) 2 *Ves.* jun. 357. 2 *Sugden Pow.* 73.

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Mr. *Tinney*, in reply. If the appointment had been in terms to the husband in right of his wife, it would unquestionably have been good; because it would give the wife, the same interest, as if the appointment had been made directly to her; on the same principle that an appointment to a stranger, in trust for an object of a power, is valid. (*a*)

No such case as *Mallison* v. *Andrews* can be found in the registrar's book. Sir *E. Sugden* (*b*) conceives it to be that the case of *Mallison* v. *Andrews* is an inaccurate report of *Maddison* v. *Andrew*. (*c*) When a valid appointment is fettered with an unauthorised condition, the authorities are clear that the appointment is good and the condition is void (*d*); he also cited *Tanner* v. *Radford*. (*e*) The power authorises a settlement, but the limitations must be for children, and not grandchildren.

Aug. 7. The Master of the Rolls (after stating the case).

In the first place, gifts and appointments are made to *Charles Hewitt* and *John Bradley*, as the husbands of *Mary* and *Fanny*; and it appears that if the appointments had been unclogged by any condition they would have given to the husbands no more than they would have been entitled to in the marital right if the appointments had been directly and absolutely to the wives, and would consequently, upon the reasoning of Lord *Rosslyn*, in *Bristow* v. *Warde* (*g*) have been good; but, the

(*a*) See *Thornton* v. *Bright*, 2 *Myl. & C.* 250.
(*b*) 2 *Pow.* 280. n.
(*c*) 1 *Ves.* sen. 57.
(*d*) See *Carver* v. *Bowles*, 2 *Russ. & M.* 301.
(*e*) 6 *Simons*, 21.
(*g*) 2 *Ves.* jun. 336. 2 *Sug.* 296.

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the direction to retain a portion of the share of the fund appointed to the husbands, for the satisfaction of debts due to the testatrix herself, or to one of her trustees, is void; and I am of opinion that the husbands, in right of their wives, are entitled to the one sixth share appointed to them, and that the trustees are not entitled to deduct the debts, which the testatrix has recited to be due to her, from those appointed shares.

Secondly; with respect to the share intended for *Elizabeth*, I think that there is an alternative gift; the words seem to me, to have the same effect, as if the testatrix had said, if my daughter die in my lifetime, and shall have issue, I give her share to such issue; but if she has no issue, I give her share to the survivors, or survivor of my own children: as to the latter alternative the appointment is good, in favour of the children surviving at the death of the testatrix.

Thirdly; I am of opinion, that the appointment to the children, or issue of the children of the testatrix, is void: the grandchildren do not appear to me to have been objects of the power; and whatever inference may in some cases have been deduced, from the word "settled," in favour of grandchildren, is excluded in this case, by the express direction, that the limitations over were to be for the benefit of the children.

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June 27.
July 6.

TARLETON *v.* BARNES.

THE bill was filed by *John Tarleton* against *James Barnes*, *John Hornby*, and others; but it is unnecessary here to state its objects.

To this bill, *Hornby* put in a plea of a suit pending in the Court of Exchequer for the same matter; which was in the following form: —

"This Defendant, by protestation, &c., doth plead unto the said bill, and for plea saith, That heretofore, and before said Plaintiff exhibited his bill in this honourable Court (to wit in *Michaelmas* term 1832), the said complainant exhibited his bill of complaint in her Majesty's Court of Exchequer at *Westminster;* which bill was afterwards duly amended; and, as amended, was against the said Defendant *James Barnes* and others, (stating them); and was for the same matter, and to the same effect, and for the like relief and purposes, as against this Defendant, as the said complainant doth by his present bill set forth and pray for: and this Defendant saith, that being served with process of *subpœna* for that purpose, he appeared to the said bill, in the said Court of Exchequer, and put in his plea to the said amended bill; for that, by the means in the said plea mentioned, *James Barnes*, one of the Defendants in the said amended bill mentioned, had ceased to be a party, and was not then a party to the said amended bill: and this Defendant saith, that the said plea having been set down for argument, came on to be

Where a Plaintiff sets down a plea of *lis pendens* for argument, he admits that the two suits are for the same matter, and the plea will be allowed, unless defective in its form.

If the Plaintiff does not, in the case of a plea of *lis pendens*, obtain an order of reference to the Master, to enquire whether the two suits are for the same matter, the Defendant may, after a month, dismiss the bill.

On the allowance of a plea to the whole bill, the cause is not out of court until a subsequent order has been obtained dismissing it.

With some exceptions, as to costs, the proceedings in the Court of Exchequer on the allowance of a plea are substantially the same as in this Court.

be heard before the Lord Chief Baron of the said Court of Exchequer, on the 25th of *April* 1835, when his Lordship was pleased to allow the said plea; and the same was allowed in due form accordingly; and this Defendant saith, that the said amended bill is still depending in her Majesty's Court of Exchequer, and the said cause is yet undetermined. (*a*) Wherefore, forasmuch as the said complainant hath brought in his said bill in this Court, against this Defendant, for the like account, and praying such and the like relief as is prayed against this Defendant by his said former bill, brought as aforesaid in the said Court of Exchequer, this Defendant doth plead the said bill, depending in the said Court of Exchequer as aforesaid, in bar to the said complainant's present bill, and to the discovery and relief therein by him prayed against this Defendant: and this Defendant humbly prays the judgment of this Court, whether he ought to be compelled to make any further or other answer to the said bill: and he prays to be hence dismissed, with his reasonable costs and charges in this behalf sustained."

Mr. *Spence*, Mr. *G. Richards*, and Mr. *Booth*, in support of the plea. If the Plaintiff intended to dispute the truth of the plea, he ought not to have it set down for argument, but should have obtained a reference to one of the Masters to look into the two suits, and to report whether they were both for the same matter. If the plaintiff sets down such a plea to be argued, he admits the truth of the plea, that a former suit for the same matter is depending; and the plea must therefore be allowed, unless it is defective in form. (*b*)

Mr.

(*a*) See *Tarleton* v. *Hornby*, 1 *Yong. & Coll.* 172—333.

(*b*) *Redesdale*, page 247. 4th edition; and see *Cooper on Pleading*, p. 275. *Beames on Pleas*, 145.

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Mr. *Pemberton* and Mr. *Teed*, *contrà*.

The rule of the Court, on the argument of a plea, is that the Plaintiff admits every thing which is well pleaded, but does not admit the law or the conclusions stated in the plea. It appears from the statements in this plea, that there is no suit now pending in the Exchequer as respects *Barnes*. The plea of *Barnes*, in the Exchequer, being allowed, the suit there ended as far as he was concerned; the allegation in this plea, that the cause in the Exchequer is yet undetermined, may be very true; but undetermined as against whom? Not undetermined as against *Barnes*, but as against the other Defendants to the suit who did not plead. [*The* MASTER *of the* ROLLS. The allowance of a plea does not necessarily put the case out of Court.] Not if the plea contains issuable matter. The truth of the Exchequer plea was to be tried by the inspection of the record; it did not contain matter on which issue should be taken, nor is it stated that issue was ever taken thereon. The case was out of Court by the allowance of the plea. In *Barnett* v. *Grafton* (*a*) the Vice-Chancellor recognised this to be the practice: he there says, "the plea being allowed, the bill would have been out of Court, unless the Plaintiff had taken issue on the matter of fact by replying to the plea."

Huggins v. *The York Buildings* (*b*), and *Law* v. *Rigby* (*c*). Lord *Redesdale*, 306.; *Hinde*, 177., were cited.

Mr. *Spence*, in reply, contended that the allowance of a plea did not put the suit out of Court, but that the Plaintiff might take issue and proceed in the suit.

The

(*a*) 8 *Sim.* 72.
(*b*) 2 *Atk.* 44.
(*c*) 4 *Bro. C. C.* 60.

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A party is not liable to have two suits prosecuted against him for the same matter. In the case of a plea of this description, the practice is to refer it to the Master, to inquire if the two suits are for the same matter; and it is a rule, that if the Plaintiff sets down such a plea, he must be taken to admit, that the two suits are for the same matter. It is said here, that this plea is contradictory in itself; and that at the same time that it alleges that the suit is still depending, it states matters, by which it appears, that the suit is not depending, as against this Defendant; the statement is [his Lordship stated it]. The plea in the Exchequer "being allowed in due form," it is said, that the cause as against the Defendant, has been disposed of.

I think it necessary to inquire what is the practice in the Exchequer, in a case of this kind. If it should appear to be the practice there, that after the allowance of a plea, the bill is not out of Court, I must then allow this plea.

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This case was argued upon a plea filed by the Defendant, alleging that another bill, for the same matter, is depending against him in the Court of Exchequer.

The usual course upon such a plea being filed, is for the Plaintiff to obtain an order referring it to the Master to inquire, whether the two suits are for the same matter.

☞ If the Plaintiff takes no step, the Defendant, after the lapse of a month, is entitled to an order to dismiss the

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the bill; on the other hand, if the Plaintiff, declining to apply for the usual reference, thinks fit to set down the plea for argument, he is at liberty to do so: but by so doing, he is held to admit the fact, that a former suit for the same matter is depending; and the plea is to be allowed, unless it is defective in point of form.

In this case the plea was set down by the Plaintiff; and the objection made to it is, that although it alleges a former suit to be depending, it states a circumstance inconsistent with that allegation; namely, that a plea put in by the Defendant to the former suit, which was instituted in the Court of Exchequer, was allowed. The plea is as follows: [His Lordship here stated the terms of the plea, and proceeded.]

If the former suit had been depending in this Court, I should not have delayed my decision: but the question raised, is whether the allowance of a plea in the Court of Exchequer, which is referred to in this plea, puts an end to the suit there, or operates as a dismissal of the bill? and I therefore thought it right to inquire, what is the course of proceeding in the Court of Exchequer.

The result is, that with some exceptions as to costs, the proceedings in the Courts of Chancery and Exchequer, in cases of this nature, are substantially alike.

On the allowance of such a plea in the Court of Exchequer, the Defendant obtains 30*s.* costs; but the effect is not to dismiss the bill, or to put an end to the cause.

If the facts alleged in the bill, are such, that they may be proved, or disproved by evidence, the allowed plea

plea is considered as a sufficient answer, and the Plaintiff may reply, and proceed to a hearing in the usual course.

If the facts alleged in the plea, be ascertained to be true upon inquiry, in cases which admit of that course, or be such that their truth cannot be disputed, there may be circumstances which would induce the Court to give the Plaintiff leave to amend; and if leave be obtained, the Plaintiff may proceed on the amended bill, in the usual course.

If the case be such, that the effect of the plea cannot be avoided by amendment, or if the Court refuses leave to amend, the allowance of the plea is an effectual bar to the further progress of the suit; but the bill is not thereby dismissed. To dismiss the bill, and give to the Defendant the costs of the suit, other than the costs of the plea given on the allowance thereof, an order must be obtained for the purpose; and this may be on the application of the Defendant or of the Plaintiff. And unless such an order be obtained the Plaintiff is not at liberty to commence a new suit against the Defendant for the same matter.

The suit therefore, after the allowance of the plea, is still to be considered as a suit depending; and there is no inconsistency in this plea.

There are cases, in which, when it appeared that the progress of the Plaintiff, or the further prosecution of the suit by him, for the purposes for which it was instituted, has been effectually barred, it has been metaphorically said, that the cause was out of Court; this has been said, where the single step wanting, was an order to dismiss

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miss the bill, but in such cases it appears to me that till that order is obtained the suit is still pending.

This plea therefore must be allowed, with the costs of suit, under the thirty-first order. (*a*)

(*a*) 2 *Russ.* Addenda 15.

1837. *Nov.* 5.

1838. *Feb.* 13.

CALVERT *v.* The LONDON Dock Company.

A contractor undertook to perform certain works, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work: Held, that the sureties for the due performance of the contract, were released from their liability, by reason of payments exceeding three fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work.

THE bill, in this case, was filed by Mr. *Calvert*, as legal personal representative of *Richard Laycock*, deceased, and by *Thomas Warburton*, against the *London* Dock Company, *Isaac Solly*, stated to be their treasurer, and other persons, being the executor and executors of *James Warre*, deceased, and it prayed for a declaration, that the Plaintiffs, and the estate of *Laycock*, were, in equity, relieved and discharged from the bond in the bill mentioned; or that the *London* Dock Company had not, by breach of the condition, sustained any damage, for which, in equity, the Company, or the representatives of the obligee on their behalf, ought to be permitted to put the bond in suit against the Plaintiff: and that the Defendants might be restrained, by perpetual injunction, from all further proceedings at law against the Plaintiffs, respecting the matters in the bill mentioned.

The following were the circumstances of the case: — By contract, in writing, dated the 29th day of *September* 1829, *Robert Streather*, a builder, agreed with *James Warre*,

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Warre, the treasurer of the *London* Dock Company, on behalf of the Company, to perform certain works, which were to be commenced twenty days after notice, and to be completed in twelve months from the commencement. *Streather* was to provide all materials and labour, in consideration of 52,200*l.*, and being allowed to appropriate certain materials mentioned: the engineer of the Company, was to be the sole judge of the works, and was to employ competent persons to perform the works, if *Streather* failed to do so; and in that case, the costs thereof were to be deducted from the sum to become due to *Streather* under the contract: a provision was made for varying the price, on any variation being made in the work specified in the contract: and Mr. *Warre*, for the Company, agreed to pay the 52,200*l.* by instalments; viz., three fourths of the cost of the work certified to be done every two months, and the remaining one fourth after the full completion of the contract.

On the 3d of *November* 1829, *Streather*, and *Warburton*, and *Laycock*, as his sureties, executed to *James Warre*, as treasurer of the Company, their joint and several bond for the sum of 5000*l.*, conditioned to be void, if *Streather* should well and truly observe, perform, and keep, the promises and agreements contained in the contract, which, on the part of *Streather* were and ought to be performed, according to the true intent and meaning of the contract.

Notice having been given, *Streather* commenced the works on the 28th of *December* 1829, but did not complete them in twelve months, or before the 28th of *March* 1831, to which day, the time for completing the works, was enlarged, with the consent of *Warburton* and *Laycock*.

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The time having expired, the *London* Dock Company gave notice to the sureties that they would be called upon to pay the 5000*l.* under the bond.

On the 13th of *April* 1831, *Streather* quitted the works, and left the Company in possession of engines, and implements, and materials of great value, belonging to him. He soon afterwards became bankrupt, and his assignees brought an action of trover against the Company for the engines, implements, and materials of *Streather* in their possession. (*a*) In the action, and upon the proceedings under a reference which grew out of it, the assignees established their title to recover 316*l.*; but the bankrupt, *Streather*, appeared to be indebted to the Company in a sum exceeding 8000*l.*

The Company alleged, that they had sustained damage to the amount of more than 7000*l.*, by the default of *Streather;* and in *January* 1835, they caused actions to be brought against the sureties, to recover the full penalty of the bond; and in the particulars of their demand, they stated that they had made payments on account of the contract, to the amount of 49,619*l.* 5*s.*, and in completing the works 18,875*l.* 3*s.* 2*d.*, making together 68,494*l.* 8*s.* 2*d.*: that there had become due to *Streather*, on the contract, 52,200*l.*; for varied and increased work, 3721*l.* 16*s.* 8*d*; and for the implements, engines, and materials he had left, 4857*l.* 3*s.* 9*d.*, making, in all, 60,779*l.* 0*s.* 5*d.*; and they represented the differences as the amount of their loss sustained by the non-performance of the works by *Streather*.

Under these circumstances the Plaintiffs filed their bill; and after alleging that the referee in the action against

(*a*) *Crowfoot* v. *The London Dock Company*, 2 *Cr. & Mee.* 637.

against the company, had stated, that although the payments made to *Streather* amounted to 49,619*l.*, the value of the work done by *Streather* was only 36,429*l.*, they charged, that in executing the bond, the sureties considered, and had a right to consider, that the company, until the entire performance of the contract, would have retained in their hands, so much of the contract price, as by the contract, they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to *Streather* more than they were bound to do, the company deprived the Plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond; or at least, could not equitably recover against the Plaintiffs, any loss which they might have sustained, by making such advances; and ought not to be permitted to sue the Plaintiffs on the bond, for if they had not made such advances, they would not have sustained any loss by the non-performance of the contract.

The common injunction, for want of answer, was obtained, and no motion was made either to dissolve it, or to extend it to stay trial.

The actions were tried on the 20th of *February* 1836. The Plaintiffs there obtained a verdict, with only nominal damages. The Plaintiffs in the action, who were the Defendants here, applied to the Court of King's Bench to increase the damages; and the Plaintiffs here prosecuted the suit to a hearing.

The cause came on to be heard on the 7th of *March* last, before the application to the Court of King's Bench had been disposed of. On that account the hearing was postponed; but the proceedings in the King's Bench having ended in an order that the

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verdict should stand (*a*), the cause was brought on again.

It was now asked, that the common injunction which has been granted, might be made perpetual, and that the Defendants might pay the costs of suit.

Mr. *Tinney*, Mr. *Kindersley*, and Mr. *Roupell*, for the Plaintiffs, contended that the company, by making advances to *Streather* of more than two thirds of the value of the work done, had varied the contract to the prejudice of the sureties, and thereby discharged them from their liability under the bond. *Rees* v. *Berrington* (*b*), *Mayhew* v. *Crickett* (*c*), *Bowmaker* v. *Moore*. (*d*) That the Defendants, by paying *Streather* before the time limited, had removed the inducement to him to perfect the works. And that if no more than two thirds of the value of the work had been paid to *Streather*, there would have been a reserved fund, to answer any default and to indemnify the sureties. That the Defendants, who were entitled to nominal damages only, had wantonly involved the Plaintiffs in expensive litigation for no useful purpose. That this Court would not countenance a party in prosecuting an action in such a case; and that the Defendants ought, therefore, be decreed to pay the costs both at law and in equity.

Mr. *Pemberton*, Mr. *Phillimore*, and Mr. *Blunt*, for the Defendants, insisted that nothing had been done in this case to release the sureties: that the company had made the extra advances to the contractor, not under the contract, but as loans, which they were entitled to do,

(*a*) See *Warre* v. *Calvert*, 7 *Ad. & Ell.* 143.
(*b*) 2 *Ves.* jun. 540.
(*c*) 2 *Swans.* 185.
(*d*) 7 *Price*, 214.

do, and had thereby greatly facilitated the performance of the work. That so far from prejudicing the sureties, the company had diminished their liability; for, but for these timely advances, the contract would long before have been abandoned, and the bond forfeited.

On the point of costs they said that the Plaintiff's remedy was at law; and it was no justification for the prosecution of this suit, and no reason for the interference of this Court, because nominal damages only were recoverable at law. That the costs of the action had been provided for at law, and no costs ought to be given in this suit; for the point in litigation between the parties having been already decided by the Court of King's Bench, there was no ground for now making any decree.

Mr. *Kindersley*, in reply.

The object of the company in retaining one fourth of the price was a security to them that the contractor should complete the work. The sureties were entitled to the benefit of this security, and of this they have been deprived, by the mode in which the company, without the sureties' consent, have dealt with *Streather*. If, at the time when *Streather* abandoned the work, the company had had the intended reserved fund in their hands, the sureties would themselves have been enabled to have completed the works without loss, and even nominal damages would not have been recovered.

The MASTER *of the* ROLLS (after stating the case) proceeded: —

The Defendants do not dispute the fact that their advances to *Streather* exceeded the sums which they were bound to advance under the contract, but they

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say, that the increased advances were made for the purpose of giving *Streather* greater facility to perform the contract. It is said that the performance of the work by *Streather* was impeded by his want of funds; and that by the advances made to him, he was enabled to do more, than he otherwise could have done — and that to assist him, was to assist his sureties: and it was only for the purposes of affording that assistance, that the company did more than they were obliged to do.

The argument however, that the advances beyond the stipulations of the contract, were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety — and the answer has always been, that the surety himself was the proper judge of that — and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case, the company were to pay for three fourths of the work done every two months; the remaining one fourth, was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge *Streather* to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties.

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What the company did, was perhaps calculated to make it easier for *Streather* to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands, one fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to *Streather*, was so far altered, that the sureties must be considered to be discharged from their suretyship.

I think therefore, that the Plaintiffs are entitled to have the injunction made perpetual; and that they are also entitled to the costs of this suit.

The Plaintiffs appear not to have had a complete legal defence, though they had a case which reduced the damages to a nominal amount. They could not, however, anticipate the result of the action. They had an equitable defence; and, under the circumstances of this case, if an application had been made for the purpose, I do not think that the Plaintiff in equity would have been ordered to give judgment; and, after the verdict with nominal damages, the application to the Court of King's Bench made by the Plaintiffs at law, made it important for the Defendants there to proceed with their bill in equity.

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Jan. 16.

HAMES *v.* HAMES.

Held, upon the construction of a marriage settlement, that under a limitation "to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit," his executors were not entitled beneficially.

THE bill, in this case, prayed that the rights of the parties to certain monies subject to the trusts of a marriage settlement might be ascertained and declared.

The case was, that by settlement dated the 6th of *November* 1788, and made between *John Hames* of the first part, *Grace Hayter* of the second part, and *George Garrard Hayter*, *Thomas Greening*, and *Hawkins Wall* of the third part, after reciting, that *John Hames* was intitled to certain leasehold estates, and that *Grace Hayter* was intitled to an interest in 250*l.* a year long annuities, with a limitation over to her children, and to other considerable personal property; and that a marriage had been agreed upon between *John Hames* and *Grace Hayter;* and that upon the treaty for the marriage, it was agreed, that *John Hames* should become intitled to all the personal property of his intended wife, except her interest in the long annuities; and "that in consideration thereof, and in order to make a further provision for *Grace Hayter* and the issue of the intended marriage, *John Hames* had agreed to assign the leasehold premises, upon the trusts after mentioned;" it was witnessed, that *John Hames* assigned the leaseholds to the trustees, on trust to permit him (*John Hames*) to receive the rents and profits during his life; and, immediately after his decease, out of the rents to pay an annuity of 250*l.* to *Grace Hayter;* and after payment of the said annuity, upon trust to pay the residue of the rents, if any, "unto the executors or administrators of the said *John Hames*, for and during the natural life

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life of the said *Grace Hayter* (the intended wife); and from and after the decease of the survivor of the husband and wife, on trust, with all convenient speed, to sell the leaseholds, and receive the purchase money, and thereout pay the expences of the trust, and to each child of the marriage so much money, as together with the interest of such child in the long annuities, would amount to 1500*l.*, to be payable at twenty-one years of age, with a provision for maintenance in the mean time: and in case any such child should happen to die under the age of twenty-one years, as to the share of such child so dying, and also as to the residue of such trust monies, to arise from such sale or sales as aforesaid, upon trust for the executors, administrators, or assigns of the said *John Hames*, to and for his and their own absolute use and benefit; and in case there should be no child or children of the body of the said *John Hames*, on the body of the said *Grace Hayter* lawfully to be begotten, or there being such, all of them should die under the age of twenty-one years, then as to the whole of such trust monies, upon trust for the executors, administrators, and assigns of the said *John Hames*, absolutely for ever; and to and for no other trust, intent, or purpose whatever."

John Hames then covenanted to renew the leases, to insure the premises against loss by fire, and further, that in case he should die in the lifetime of his intended wife, his executors or administrators should, during the life of the wife, pay to her the annuity of 250*l.*; and then followed a proviso, that so long as the executors or administrators of *Hames* should pay that annuity, the trustees of the settlement should stand possessed of the leaseholds, "upon trust to permit and suffer the executors or administrators of him, the said *John Hames*, to receive and take the rents, issues, and profits thereof,

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to and for their own use and benefit, anything thereinbefore contained to the contrary thereof in any wise notwithstanding."

The marriage took effect, and there were two children, *George* and the Defendant *William*.

On the 28th of *November* 1803, *John Hames* made his will, whereby he appointed *Grace Hames* and *G. G. Hayter* his executors. The testator died in 1804, and *Grace Hames* and *G. G. Hayter* proved his will in *November* 1820. *George Hames*, the son, died, leaving his mother and his brother *William*, his next of kin.

G. G. Hayter, the trustee and executor of *John Hames*, afterwards died, leaving the widow, *Grace Hames*, him surviving: and, in *April* 1837, *Grace Hames* died, having bequeathed all her property to Defendant.

The question in this case was, whether the surplus of the produce of the leaseholds, after providing for the portions of the children of the marriage, formed part of the residuary estate of *John Hames*, the settlor, or belonged to his executors beneficially.

Mr. *Pemberton* and Mr. *Rogers* for the Plaintiff.

Mr. *Kindersley* and Mr. *Heberden* for the Defendant.

The Master of the Rolls postponed giving judgment.

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The question argued was, whether the surplus of the monies arising from the sale of the settled leaseholds, after providing for the portions, forms part of the residuary

residuary estate of *John Hames*, or belongs beneficially to his executors.

The consideration of the settlement was the marriage, and all the wife's property except her interest in certain long annuities.

The purpose was to make a provision (beyond the interest in the long annuities) for the wife and the issue of the marriage.

The provision for the wife is an annuity of 250*l.*, payable to her after the death of the husband, during her life, out of the rents of the settled estates.

The provision for the issue is so much money as, with the value of the interest in the long annuities, will make the fortune of each child who shall attain twenty-one, the sum of 1500*l.*; and the portions, after the death of the husband, were to be raised by sale of the settled estates, after the death of the survivor of husband and wife.

And supposing the expressed object and purpose of the settlement, to be the only object in view, and consequently, that the property was to remain the husband's, subject to the provisions for the wife and children, there was still a period after his death, during which the trustees of the settlement, were, for the performance of their trust, to hold the property against those who succeeded to the rights of the husband. If the husband died first, the trustees had to pay the annuity, and raise the portions; if the husband died after the wife, they had to raise the portions: but, subject to these provisions, these leasehold estates and the money arising from the sale of them, would have vested in the executors or administrators

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administrators of the husband, as part of his personal estate.

The question is, whether this deed is so framed as to alter that result. It is alleged, that the words are such, as necessarily to vest the whole interest in the leaseholds, subject only to the provisions for the wife and children, in the executors or administrators of the husband, for their own use and benefit.

It is extremely improbable, that the settlor, executing a marriage settlement, and professing that his object was to make a provision for his intended wife, and the issue of the marriage, should silently intend, to make a provision for the person, who should chance to be his administrator — perhaps a small creditor — perhaps a person to whom administration might be granted *durante minori ætate*, or upon some other contingency; and unless the words are incapable of any other construction, and the Court is absolutely compelled, by force of them, to impute that highly improbable intention, that conclusion, ought not to be adopted.

When we examine the words, we find, that in the event of the husband dying first, the trustees are directed to pay the annuity to the wife, and the surplus rents, to the executors or administrators of the husband, during the life of the wife. These words, do not confer any beneficial interest, on the executors or administrators of the husband; if the deed had stopped there, they would only have taken the surplus rents, as part of the husband's personal estate.

Then comes the direction to sell, after the deaths of the survivor of husband and wife, and to pay the portions to the children at twenty-one, with maintenance in the mean

mean time; and as to the portion of any child dying under twenty-one, and the residue of the trust monies, in trust for the executors, administrators, or assigns of the husband, to and for his and their own absolute use and benefit; and if there should be no child living to attain twenty-one, then, as to the whole of such trust monies, upon trust for the executors, administrators, and assigns of the husband, absolutely for ever. Here we have two different expressions; if there should be no child, all the trust monies, were to be paid to the executors, administrators, and assigns of the husband, absolutely for ever. I think that these words do not themselves give a beneficial interest to the executors or administrators; but if the portion of a child should not become payable, in consequence of its death, under twenty-one, then such portion and the residue are given to the executors, administrators, or assigns of the husband, to and for his and their own absolute use and benefit: and these words of themselves, and not applied to persons intended to take in a merely representative character, would undoubtedly confer a beneficial interest.

The settlor, although he had directed the trustees, to pay the wife's annuity out of the rents of the estate, nevertheless, in a subsequent part of the deed, covenanted that his executors should pay the same; this was a covenant to be performed out of the assets of the settlor: but it is immediately followed by a proviso, that so long as the executors or administrators shall pay the annuity, the trustees shall stand possessed of the estates, on trust to permit the executors or administrators of the settlor to receive the rents, issues, and profits thereof, to and for their own use and benefit, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding.

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The settlor, having before directed the trustees to pay the annuity to the wife, and the surplus rents to the executors or administrators, in words which would not give a beneficial interest to the executors or administrators, now says, "I covenant for the payment of the annuity, and if my executors or administrators pay it you, the trustees are to permit them to receive the rents for their own use and benefit."

It seems quite absurd to suppose, that the settlor should intend, when not charging his general assets, to give his executors or administrators the surplus rents as part of his general estate: and should intend, after he had charged his assets, to give his executors or administrators the whole rents for their own use and benefit. There is, in these provisions, an inconsistency which can be reconciled, only by attending closely to the intent and object of the settlement, which was to make provision for the wife and children to a certain and limited extent: and for that purpose, to give to the trustees such powers, as were necessary to secure those provisions; and to give to the settlor's executors, such estates and powers, as were necessary to enable them to recover from the trustees, such part of the property, as exceeded the amount of the provision intended for the children, after the death of the husband and wife.

The words must be admitted to be, in this, as they have been in former cases, strong and difficult to manage; but if the intention appears as I think it does, it is the duty of the Court to give effect to it; and I am of opinion that upon the true construction of the settlement, and subject to the provisions for the wife and children, the whole property and interest were reserved to the husband, his executors, administrators, and assigns, for his and their absolute use and benefit: and

and that the executors and administrators of the husband, are intitled thereto, only in their representative character, and not beneficially.

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Note. — On the subject of executors and trustees taking beneficially, see *Sanders* v. *Franks*, 2 *Mad.* 147.; *Collier* v. *Squire*, 3 *Russ.* 467.; *Wellman* v. *Bowring*, 3 *Sim.* 328.; *Stocks* v. *Dodsley*, 1 *Keen*, 325.; *Wood* v. *Cox*, 1 *Keen*, 317.; *S. C.* 2 *Myl. & Cr.* 684.; *Palin* v. *Hills*, 1 *Myl. & K.* 470.; *Bridge* v. *Abbott*, 3 *Bro. C. C.* 224.; *Evans* v. *Charles*, 1 *Anst.* 128.

GRIEVESON *v.* KIRSOPP.

July 1.
Aug. 7.

A testator gave to his widow, "for the benefit and advantage of his children," power of selling his *Woodfort* estate. By a codicil he expressed himself (in effect) thus: "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife *shall* and may divide and proportion among my

THE principal questions in this case arose upon the construction of the will and codicil of the testator *John Carr*. The will was dated on the 16th day of *November* 1795, and was as follows: — "I *John Carr* of, &c., do give and bequeath unto my wife *Sarah Carr*, during her natural life, should she remain in a state of widowhood, the sum or sums of money that may accrue from the interest of 300*l.* for her use and enjoyment, and after her decease my will and desire is, that the full and perfect sum of 300*l.* before mentioned be left to my son *John Carr*. Item, or likewise, I do give and bequeath unto *Sarah Carr*, my wife, the time she may hereafter continue my widow, for the benefit and advantage of my children, full discretionary power either to hold or dispose of my estate called *Woodfoot* and *Slaley*, as she may find the same most convenient; but if at any time she should desire to dispose of the same, my will and

said children as she shall think fit and proper, or as she shall direct by will."

The estate was neither sold nor appointed by the widow: Held that a trust for the children was created by the will, and that they were entitled equally.

Held, also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

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and desire is, that every circumstance attending the same be transacted and managed by the gentleman in trust hereafter mentioned. Item, or likewise, I do give and bequeath unto my children, *Barbara Carr*, *Susannah Carr*, *Sarah Carr*, *Mary Carr*, and *Frances Carr*, the real and full sum of 100*l.* each, which sum or sums are to be paid from the lands of *Slaley Woodfoot* and *Slaley* before mentioned; and my will and desire is, that each and every of them, may have such sum or sums as before mentioned, at their own disposal, as they and each of them attain the age of twenty-one. Item, or likewise, I do give and bequeath unto my son *John Carr* all and every the rest, residue, and remainder of estates, properties, and effects, both here and elsewhere, which at any time, or from time to time, may become my true right and property. Item, or likewise, I do will and grant that all claims, demands, debts, or incumbrances, of what kind soever and wheresoever, be discharged from the effects and monies, that may arise from the personal properties, effects, or possession, upon or belonging to the estates commonly called and known by *Slaley Woodfoot* and *Slaley;* if such personal properties are insufficient, to discharge the before mentioned contingencies, my express will and intention is, that all and every the rest, residue, and remainder of claims, demands, debts, and incumbrances, of what kind soever or wheresoever, be discharged from the estates before mentioned. Item, or likewise, I do constitute and appoint *Anthony Surtees*, Esq., *John Hall* and *William Hopper*, gentlemen, in full power and trust with the disposal of my lands, woods, and estates, should my wife *Sarah Carr* think proper to dispose of the same."

The codicil was dated on the 23d day of the same month of *November* 1795, and was as follows: — "And whereas by my said will I did give and bequeath to my children

children certain sums of money as therein is mentioned, now my will and mind is, that my wife *Sarah Carr*, and I do hereby empower her, by and with the assistance and help of the trustees therein named, to sell and dispose of all my estates whatsoever, and the money arising from such sale or disposal, together with my personal estate, she, my said wife, *shall* and may divide and proportion among my said children as she shall think fit and proper, or as she shall direct and order by any will or writing by her executed in the presence of two or more credible witnesses; and I do hereby make, constitute, and appoint her, my said wife *Sarah Carr*, sole executrix of my said last will and testament."

The testator died in 1805, and his widow lived till 1829. The property was not sold in the widow's lifetime; and she died without making any valid appointment of the property: although, by her will, she attempted to appoint it to a son-in-law, and to some of her grandchildren; they, however, not being objects of the power, the appointment was inoperative.

The bill, in this case, was filed by *John Grieveson*, as the legal personal representative of *Barbara*, his deceased wife, who was one of the daughters of *John Carr*, the testator in the cause, against *John Kersopp*, and various persons, claiming to be interested in the testator's estate; and it is prayed, that the rights and interests of the Plaintiff and the other parties might be ascertained and declared; and that the Defendant *Sarah Carr Teasdale* and *John Carr Kersopp*, who were the coheirs of the testator, might be declared to be trustees of the real estate for the benefit of the Plaintiff and the legal personal representatives of the testator's children, subject to the mortgage securities affecting the same. The bill also prayed for an account of the personal

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sonal estate, and of the rents of the real estate, accrued since the death of *Sarah Carr*, the widow of the testator; and that the real estate might be sold, and for consequential directions. It had been ascertained by the Master, what children the testator left, and who now represented them, and also what assignments of the interests of such children had been made; and the cause now came on for further directions.

The two principal points discussed were, first, Whether the power of sale and devise given to the widow were so imperative on the widow, as to create a trust for her children, which, in default of her execution of the power, would entitle the children to the unappointed property; and secondly, Whether the shares of the children who were dead, were, as between their representatives, of the nature of real or personal estate.

Mr. *Spence* and Mr. *Bailey*, for the Plaintiff.

Mr. *Hall*, Mr. *Reynolds*, Mr. *Hallett*, Mr. *Anderdon*, Mr. *Bellamy*, Mr. *G. Richards*, and Mr. *Purvis*, for other parties.

The following authorities were cited and relied on: — *Duke of Marlborough* v. *Lord Godolphin* (*a*), *Crump* v. *Adney* (*b*), *Cole* v. *Wade* (*c*), *Walter* v. *Maunde* (*d*), *Harding* v. *Glyn* (*e*), *Fletcher* v. *Ashburner* (*g*), *Doughty* v. *Bull* (*h*), *Ashby* v. *Palmer* (*i*), *Smith* v. *Claxton* (*k*), *Brown* v. *Higgs* (*l*), *Crossling* v. *Crossling*,

(*a*) 2 *Ves.* sen. 61, *S. C.* 5 *Ves.* 506.
(*b*) 1 *Cr. & M.* 355.
(*c*) 16 *Ves.* 27.
(*d*) 19 *Ves.* 424.
(*e*) 1 *Atk.* 469.
(*g*) 1 *Bro. C. C.* 497.
(*h*) 2 *P. W.* 321.
(*i*) 1 *Mer.* 296.
(*k*) 4 *Mad.* 484.
(*l*) 8 *Ves.* 574.

Crossling (*a*), *Ackroyd* v. *Smithson* (*b*), *Bull* v. *Vardy* (*c*), *Kennedy* v. *Kingstone* (*d*), *Dixon* v. *Dixon.* (*e*)

The MASTER *of the* ROLLS [after stating the facts].

Upon the construction of these documents, I think that the widow took a life interest, with a power to sell the real estate with the assistance of the trustees, and to distribute the money arising from the personal estate and the sale of the real estate, amongst the children, and that the power was conferred in words, which made it the duty of the widow to execute that power, and by implication gave the money to the children. I am therefore of opinion, that the power was in the nature of a trust for the children, and that subject to such appointment as the widow might have made, the children were entitled in equal shares. She survived them all without having made any appointment; and I am of opinion, that her will, made after their death, and purporting to give the testator's estate to her grandchildren, is no execution of the power. It further appears to me that the direction to sell, expressed as it is, operated as a conversion of the real estate, and that the children were entitled to take the money, to arise from the sale, as personalty.

(*a*) 2 *Cox*, 396.
(*b*) 1 *Bro. C. C.* 504.
(*c*) 1 *Ves.* jun. 270.
(*d*) 2 *J. & W.* 431.
(*e*) 2 *S. & S.* 327. 2 *Sug. Pow.* 175.

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March 12.

MACKWORTH *v.* HINXMAN.

A testator bequeathed personalty to trustees, to pay the interest to Sir *Gilbert A.*, Baronet, for life, and after his decease, to his eldest son; but in case he should die leaving no son, then in trust for the person on whom the baronetcy should devolve, so that each baronet should take the interest for life; and after the extinction of the baronetcy, to fall into the residue of his estate. At the death of the testator, Sir *Gilbert A.* and his two brothers, *James* and *Robert*, on whom the baronetcy successively devolved, were living. Sir *Gilbert A.* afterwards died without having had any issue: Held, that Sir *James* became absolutely entitled to the property.

IT appeared in this case that Admiral *Philip Affleck*, by his will, dated the 14th of *June* 1797, bequeathed to his executors his share and interest in the *British* Cast Plate Glass Manufactory, the *British* Fishery, and the Grand Junction Canal, in trust, to receive the interest, dividends, and profits thereof, as the same should from time to time respectively become due and payable, and pay the same unto his nephew, Sir *Gilbert Affleck*, Baronet, for and during the term of his natural life; and from and after the decease of the said Sir *Gilbert Affleck*, then in trust to pay the said interest, &c., as the same should from time to time be received, unto the eldest son of the said Sir *Gilbert Affleck*, lawfully begotten, for the time being; but in case the said Sir *Gilbert Affleck* should happen to depart this life, leaving no son lawfully begotten, then in trust to pay the said interest, dividends, profits, and produce of the said plate glass manufactory, fishery, and canal shares, *unto the person on whom the baronetcy should devolve;* it being his will and desire, that the said interest, dividends, profits, and produce should never be alienated from the title; but that each succeeding baronet of the *Affleck* family should enjoy the said interests, dividends, profits, and produce for the term of his natural life; and from and after the extinction of the said baronetcy, in case such an event should happen, he willed and declared, that the said shares and interest in the said plate glass manufactory, fishery, and canal shares, should fall into and constitute a part of the residue of his estate.

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The testator died in 1799, at which time Sir *Gilbert* and his two younger brothers, *James* and *Robert*, were living; after the testator's death, Sir *Gilbert Affleck* continued to receive the interest and profits of the shares until 1808, when he died without having had any issue; and thereupon the baronetcy devolved upon his brother Sir *James Affleck*, who continued to receive the interest and profits of the shares until June 1833, when he died without issue, leaving Sir *Robert Affleck*, his brother, surviving him, and on whom the baronetcy descended. The bill was filed by the executors of Sir *James Affleck* against Sir *Robert Affleck*, and the personal representatives of the testator, claiming to be absolutely entitled to the shares in the plate glass manufactory, fishery, and canal company; and also a gold snuff-box and some plate, which had been settled by the will of the testator, on the same trusts.

Mr. *Kindersley* and Mr. *Amphlett*, for the Plaintiffs.

A gift of the income of property indefinitely, is a gift of the property itself; *Page* v. *Leapingwell* (*a*), *Haig* v. *Swiney* (*b*), *Elton* v. *Shephard* (*c*); it therefore forms no objection to the construction for which the Plaintiffs contend, that the testator has merely directed the trustees to pay the interest, dividends, and profits, as the same should from time to time be received. The intention of the testator was, that the property should never go out of the family inheriting the baronetcy, and that it should belong to each baronet for life, until the extinction of the title; but it is clear he could not limit life estates to take effect on the death of unborn persons. It has been decided, that where a testator, intending a perpetuity, gives successive life estates, the effect is, to give an estate

(*a*) 18 *Ves.* 463.
(*b*) 1 *Sim. & Stu.* 487.
(*c*) 1 *Bro. C. C.* 532.

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estate tail to the first taker, notwithstanding a life estate only has been limited to him; *Mortimer* v. *West.* (*a*) To ascertain who is entitled to the absolute interest as the first taker, the state of things, as they existed at the decease of the testator, and not the events which have since happened, must be regarded; this rule was laid down by Lord *Kenyon*, in the case of *Jee* v. *Audley* (*b*), who said, "Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me, is not, whether the limitation is good, in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so." Now take the limitations as they were at the death of the testator: they were, first, a gift to Sir *Gilbert* for life, with remainder to his eldest son: and in case Sir *Gilbert* should die leaving no son, then to the person on whom the baronetcy should devolve. As the baronetcy was originally settled in tail male, the event on which it was given over must necessarily have happened or failed on the death of Sir *Gilbert:* If he died without leaving a son, the baronetcy would have devolved on his next brother, Sir *James;* the gift therefore to Sir *James* was valid. But if the subsequent gift to Sir *Robert* were good, it would be on the event of his succeeding to the baronetcy; this could only happen by the failure of issue male of Sir *James;* this might not have happened for centuries; the gift over was therefore void, and Sir *James* became absolutely entitled. There was a case similar to the present before Sir *John Leach; Lord Deerhurst* v. *The Duke of St. Albans* (*c*); it was afterwards carried by appeal to the House of Lords,

(*a*) 2 *Sim.* 274.
(*b*) 1 *Cox*, 324.
(*c*) 5 *Mad.* 232. *S. C. nomine Tollemache* v. *Coventry*, 2 *Cl. & Fin.* 611.

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Lords, where his decision was reversed; in that case there was a gift of personal property to trustees, in trust for the testator's wife for life, with remainder to his son for life, with remainder "to such person as should from time to time be Lord *Vere*, so far as the rules of the law and equity would permit." The testator, at his death, left his wife, his son, and also two children of his son, surviving him. The wife and son died, and the eldest grandson, who became Lord *Vere*, afterwards died, leaving issue a son; and although the great-grandson came into *esse*, within the time limited by the rule against perpetuities, yet the House of Lords held, that the eldest grandson took absolutely. They also cited *Arnold* v. *Congreve* (*a*), and contended, that the representatives of Sir *James Affleck* were entitled absolutely.

Mr. *G. Richards* (in the absence of Mr. *Pemberton*) contended, that Sir *Robert*, on the death of his elder brother without issue, became absolutely entitled to the property; he admitted, that an indefinite gift of the interest amounted to a gift of the principal, but here the extent of the gift was expressly limited for life. It was clearly the intention of the testator, to give life estates only, to those whom the rules of law and equity permitted; and as Sir *Robert* and Sir *James* were the only persons in existence, who, by the rules of law, could take life estates under the dispositions of the will of the testator, he must have intended that, in the events which happened, they should take life estates only. That the last person, to whom a life interest in the property, capable of taking effect under the rules of law, was limited, would become absolutely entitled; and that Sir *Robert Affleck* was such party.

Mr.

(*a*) 1 *Russ. & Myl.* 209.

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Mr. *C. H. Maclean* for the personal representatives of the testator.

The MASTER *of the* ROLLS (without hearing a reply) said, — In all cases of this description, the question is, what is the general intention of the testator which the Court is to carry into execution? His intent here was, that the property should go on to all time with the baronetcy; he accordingly says, "His will is that it should never be alienated from the title, but that each succeeding baronet should enjoy it for life." That is, he has desired, that the person to whom the baronetcy should descend, should have an estate for life only; he has not particularised either Sir *James* or Sir *Robert* by name, though they were both living at the time; and he has not used expressions, applicable to any particular person on whom the baronetcy should devolve. The general intention expressed in his will, must have been defeated by giving successive estates for life. From the cases which have been cited, it is clearly shewn, that giving a life estate to each baronet successively, would have the effect of defeating the general intention of the testator; and for the purpose of accomplishing the intention, I think it must be held, that Sir *James Affleck* took a *quasi* estate tail in the property, and that the property, being personal, was absolutely at his disposal.

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PERRY *v.* WALKER.

May 24. 31.

THE Plaintiff in this case sued in *formâ pauperis*, and having in person opened a motion,

It is not necessary that the notice of motion of a pauper should be signed by his six clerk.

Mr. *G. Richards* objected that the motion could not be heard, on the ground that the notice of motion had not been signed by the pauper's clerk in Court. He cited *Gardiner* v. ——— (*a*), where upon a motion on behalf of a pauper, an objection was taken, that the motion was not signed by the solicitor; Lord *Eldon* considered that the clerk in Court ought to sign the notice, and desired that in future it might be understood that such signature would be required.

The MASTER *of the* ROLLS ordered the motion to stand over to inquire as to the practice.

May 31.

The MASTER *of the* ROLLS said, that he had inquired into the practice, and found that it was not considered, by the officers of the Court, essential, that the notice of motion of a pauper should be signed by his clerk in Court; and considering the understood practice, and that what had fallen from Lord *Eldon* had never been made the subject of a general order, the Plaintiff was entitled to be heard on this notice of motion.

(*a*) 17 *Ves.* 387.

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1837.
Dec. 4, 5.
1838.
April 25.

WOOD *v.* WHITE.

A real estate was vested in trustees, on trust to convey to the *cestui que trust* at a particular period; and a power of sale was given to the trustees, "during the continuance of the trust." The trustees having neglected to convey at the period stated, Held, that they could not after that time execute the power of sale, though the trusts still continued.

A testator devised his real estate, as to one fifth part thereof, to trustees in fee, on trust to pay the income to his son *William* for life, and after his death to convey it to *William*'s children; and as to another fifth, to apply the income towards the maintenance of the testator's daughter, until she should attain twenty-five or be married, and on her attaining twenty-five, if unmarried, to convey the same to her, but if she should marry before that age, then to settle it in a particular way. The testator then gave to his trustees a power of selling the property "during the lifetime or widowhood of his wife, or at any time afterwards, during the continuance of the trusts by his will reposed." The widow and *William* died, and the daughter attained twenty-one and married, but no conveyance had been made by the trustees: Held, that the power of sale could not then be exercised by the trustees, for though the trusts still "continued," yet they continued through the neglect of the trustees to convey, and not in the way contemplated by the testator.

THIS was a bill filed by a vendor, against the purchaser of the estate in question, for the specific performance of the agreement. The purchaser objected, that the Plaintiff could not make a good title to the estate; and the case was, that *John Wood* by his will dated the 2d day of *May* 1816, after giving a portion of his real estate and his household goods to his wife for life, or widowhood, and charging an annuity of 500*l.* for her benefit, upon the rest of his real estate, gave, devised, and bequeathed all his real and personal estate (subject to the interests therein which he had given to his wife) to his children; that is to say, one equal fifth part to his son *John*, his heirs, executors, administrators, and assigns; another equal fifth part to his son *Henry*, in like manner; another equal fifth part thereof to his son *Thomas Philpot*, in like manner; another equal fifth part thereof to his sons *John* and *Henry*, on trust, to pay the income thereof to his son *William* for life, and after the death of *William*, to convey and assign the same fifth part to the children of *William* as tenants in common, with a proviso for certain limitations over. And he gave the remaining fifth part of his real and personal

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personal estate, to his sons *John* and *Henry*, their heirs, executors, administrators, and assigns, in trust to apply the income thereof, to the maintenance and support of his daughter *Eliza*, until she should be married, or attain twenty-five years of age; and upon her attaining twenty-five, if then unmarried, to convey and assign the same fifth part, to her, her heirs, executors, administrators, or assigns; but if she should marry before that age, then with the advice of the testator's wife, if living, to convey, assign, and settle the same, in manner therein mentioned. And the will contained a proviso, whereby the testator declared, that it should be lawful for his sons *John* and *Henry*, and the survivor of them, and the heirs and assigns of such survivor, at any time during the lifetime or widowhood of his wife, or at any time afterwards, during the continuance of the trusts by the will reposed in them, with the consent and approbation of his wife, under her hand, during her lifetime or widowhood, and afterwards, with the consent and approbation in writing, of the person or persons, for the time being, in the possession of, or intitled to the receipt of the rents and profits of the premises proposed to be sold, under his, her, or their hand or hands, or of their or his own authority, if such person or persons should be in his or their minority, to sell, and dispose of, and convey all or any of the messuages, lands, tenements, hereditaments, and real estates, by the will before devised, or such parts or part of all or any of the messuages, lands, tenements, hereditaments, and real estates, as should be subject to such continuing trusts, and the fee simple, and inheritance thereof, for such price or prices as should be deemed reasonable; and upon payment of the purchase money, to give receipts, which should be discharges to the purchasers, who were not to be answerable for any misapplication; and he stated his will to be, that the money arising from the sale, should

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should be subject to the same trusts, as were before declared, of and concerning the residue of his personal estate, or such parts, or part thereof, as to which the trusts before declared should be continuing at the time of the sale. And he appointed his wife, and his sons *John* and *Henry*, executrix and executors of his will.

The testator died in 1820, leaving his wife and five children surviving him. After his death, his son *Thomas Philpot*, and his daughter *Eliza*, attained twenty-one years of age; and the son *William* married and had issue.

In *June* 1825, *Eliza*, being then twenty-three years of age, intermarried with *Barnard Maynard Lucas;* and, on that occasion, a settlement was made by deed, dated the 6th *June* 1825, between *Ann Wood*, the widow, of the first part; *Eliza Wood*, of the second part; *John* and *Henry Wood*, of the third; *Bernard Maynard Lucas*, of the fourth part; and *John Wood*, *Thomas Philpot Wood*, and *Thomas Burton Lucas*, of the fifth part, and thereby, after reciting the will, and that the testator's personal estate had been converted into money, and that no part of the real estate had been sold, though it was expected and intended that the same should be sold, at such time or times as should be most convenient and proper, under the power contained in the will, it was witnessed, that *Eliza Wood*, with the approbation of the parties of the first, third, and fourth parts, bargained and sold to *John Wood*, *Thomas Philpot Wood*, and *Thomas Burton Lucas*, all her part or share, of the monies to arise by the sale of the testator's real estate, and of and in the securities on which the same should be invested, and also of the monies constituting the testator's residuary personal estate, on the trusts after mentioned, for the benefit of *Eliza*

Eliza Wood, her intended husband, and their issue, and the estates, until sold, were to be subject to the same trusts.

Of this marriage there was not, at present, any issue. The son *Henry* died in 1826, having devised and bequeathed his share of the estate to his mother *Ann Wood*, who died in 1827, having devised and bequeathed the same to her sons *John* and *Thomas Philpot;* and *William Wood* subsequently died, leaving three infant children.

In this state of things, by agreement dated the 27th day of *January* 1835, *John Wood*, the surviving trustee and executor, contracted to sell the estate to the Defendant, and he filed this bill to compel the Defendant specifically to perform his agreement. The question being, whether the Plaintiff could make a good title under the power of sale.

No objection was made, to the title to the shares which were devised to the sons *John*, *Henry*, and *Thomas Philpot;* but it was contended, that no title could now be made, to the shares given to the son *William* and to the daughter *Eliza*. Those shares, it was contended, could only be sold under the power given by the will; and that the power had ceased or become incapable of being exercised.

The power was to be exercised, only during the lifetime of the widow, or during the continuance of the trusts by the will reposed in the trustees. The widow being dead, it was said, first, that the trusts as to the shares of *William* and *Eliza* were not now continuing; and secondly, that if the trusts as to the share of *William* were continuing, they were of a nature to last through

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through a succession of minorities; that there was nothing to limit the period within which the power might be exercised, and that it was therefore within the rule of law against perpetuities.

Mr. *Forster*, in the absence of Mr. *Pemberton*, for the Plaintiff.

Mr. *Tinney*, Mr. *E. Lloyd*, and Mr. *Braithwaite*, for the Defendant.

Mr. *Pemberton* in reply.

The following authorities were relied on; *Ware* v. *Polhill* (*a*), *Powis* v. *Capron* (*b*), *Biddle* v. *Perkins* (*c*), *Trower* v. *Knightley* (*d*), *Boyce* v. *Hanning* (*e*), *Cox* v. *Chamberlain* (*g*), *Corder* v. *Morgan.* (*h*)

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April 23.

The MASTER *of the* ROLLS.

Upon the question whether the trusts are continuing, I apprehend, that we are to consider, not merely whether the trusts are performed, but whether they are continuing, in the manner, and under the circumstances, in which the testator intended them to be. They may be unperformed, and in that sense (being to be performed) they may be continuing; and there may be an obligation upon the trustees to perform them now. But if the events have taken place, upon which they ought to have been performed,

(*a*) 11 *Ves.* 257.
(*b*) 4 *Sim.* 138. n.
(*c*) 4 *Sim.* 135.
(*d*) 6 *Mad.* 134.
(*e*) 2 *Cr. & Jer.* 334.
(*g*) 4 *Ves.* 631.
(*h*) 18 *Ves.* 344. 2 *Sugden's Powers*, 494. 2 *Preston's Abstracts*, 158.

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performed, they are not continuing, in the sense in which the testator intended them to be; and it does not appear to me, that trustees, by omitting to perform their trusts, at the time when they ought to perform them, can at their pleasure prolong the time, during which a power vested in them is to be exercised.

With regard to the trusts in this case, the material facts are, that before the date of the contract, the testator's son *William* died, leaving infant children; and his daughter *Eliza* married under the age of twenty-five years.

As to the share of *William*, it was devised to the trustees, to pay the rents and produce to *William* for his life, and from and immediately after his decease, to convey and assign the same share, to all, and every the child and children of *William*, as tenants in common, equally to be divided amongst them, share and share alike, and their respective heirs, executors, administrators, and assigns; with a proviso, that if any one or more of such children, should die under twenty-one years of age, without leaving issue, the part or share of him, her, or them so dying, should go, and be conveyed, and assigned to the survivors, or other of them, as tenants in common; and if all should die under twenty-one years of age, without leaving issue, the testator gave *William*'s share to his other children. The trust, therefore, as to *William*'s share, was intended to be performed upon his death; it was then that the conveyance was to be made to his children, with such contingent limitations over, as are described in the will. It does not appear, that the infancy of *William*'s children, formed any obstacle to the conveyance being made, at the time when the testator directed it to be made; the limitations might have been so framed, as fully to accomplish

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complish the purposes which the testator had in view; and if so, the trust ought then to have been performed, and has not since been continuing, in pursuance of the testator's intention, though it be still unperformed.

As to the share of *Eliza*, it was vested in trustees, on trust for her, until she attained the age of twenty-five years, or were married; and in case she married before she attained her age of twenty-five years, then the trustees were immediately after the marriage, with the advice and concurrence of the testator's wife, to convey, assign, and settle all such part of *Eliza*'s share as they, with the same advice and concurrence, should deem proper, to such uses, and upon such trusts for the benefit of *Eliza* and her issue, with such reasonable interest in favour of her husband, as they might think proper; and to convey and assign the residue to *Eliza*, or as she should appoint; and thus it appears, that the trusts as to *Eliza*'s share, were to be executed on her marriage; the conveyances and assignments were then to be made, the trusts of the will were then to be completed, and the trusts of the settlement were to commence; and although this has not been done, and the trusts of the will have not been performed, yet it does not appear, that they are continuing, as the testator intended them to be.

And it appearing to me, as to the shares of both *William* and *Eliza*, that the continuance of the trusts at the present time, arises, not from the directions of the will, or the intention of the testator, but from an omission to follow the directions which he has given, I am of opinion, that the trust now existing, is not a continuance of the trusts intended by the will, or reposed in the trustees by the testator, and not a trust, during the continuance of which, the power may be exercised.

I think,

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I think, therefore, that the power is at an end, by the determination of the trusts as intended by the testator.

Such being my opinion, it is not necessary for me to consider, the other very important question which was argued in this cause, as to the validity of the power, on the supposition that the trusts were continuing.

Under the circumstances stated, I am of opinion that the Plaintiffs are not intitled to a specific performance of the agreement, and that the bill must be dismissed with costs.

REEVES *v.* GILL.

1837.
July.
Aug. 3.

An application to hear a cause as a short cause, cannot be made, until after the *subpœna* to hear judgment is returnable.

Where, on the certificate of the Plaintiff's counsel, an application is made at the Rolls, to hear a cause, as a short cause, and the Defendant's counsel states, that the cause is not, in his judgment, a proper one to be so heard, the Court will not permit any discussion on the point, but will at once refuse the application.

MR. *W. C. L. KEENE*, on behalf of the Plaintiff, moved to have this cause set down to be heard as a short cause on his certificate, that it was a proper case to be heard as a short cause.

Mr. *Elderton*, *contrà*, resisted the motion, on the ground, that the *subpœna* to hear judgment was not yet returnable.

The MASTER *of the* ROLLS considered the application premature, and refused it.

Mr. *W. C. L. Keene*, after the return of the *subpœna* to hear judgment, renewed the application.

Mr.

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Mr. *Elderton, contrà*, said he considered the case not proper to be heard as a short cause.

Mr. *Keene*, in reply, was about to explain the nature of the cause, and to shew that it could be properly heard as a short cause, when

The MASTER *of the* ROLLS said he could hear no discussion on the subject; in this Court it was a sufficient answer to the application, that the Defendant's counsel certified that the cause was not proper to be heard as a short cause, and he must therefore refuse the application with costs.

See *Mountford* v. *Cooper*, 1 *Keen*, 464. *Hutchinson* v. *Stephens*, *Ibid.* 659. *S. C.* 2 *My. & C.* 452. The practice differs in the Vice-Chancellor's Court; see *Ker* v. *Cusac*, 7 *Simons*, 520.

1838. *May* 26.

CALVERT *v.* SEBBON.

A testator bequeathed some specific chattels and a sum of 200*l.* to *A.*, and he directed his executors to invest in the funds, such a sum as would produce 200*l.* a year, clear of the legacy duty and all other deductions, which annual sum was to be paid to *A.* for her life, and after her decease, the principal was to be paid to other parties; and the testator directed his executors, to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to *A.* *A.* and the legatees in remainder were strangers in blood to the testator.

Held, that the legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to *A.* and to those in remainder.

THE testator, *Richard Laycock*, by his will dated the 10th of *July* 1833, bequeathed to *Sarah Morris* all his household furniture, &c., and also the sum of 200*l.* to be paid to her clear of legacy duty, within three calendar months next after his decease; and the testator also directed his executors, within three calendar months after his decease, to invest in the funds, in their names, such a sum as when invested, the interest, dividends,

dends, or annual produce thereof, would from time to time produce the yearly sum of 200*l.*, clear of the legacy duty and all other deductions; and he directed his trustees, to pay the annual income of this trust fund, to such persons as *Sarah Morris* should appoint, and in default of appointment, to pay it to herself for her separate use during her life; and after her decease, he bequeathed one-third of the trust fund to the petitioners, and the other two-thirds to other parties. And he directed his trustees, out of the monies which should come to their hands, by virtue of his will, to pay his debts, funeral, and testamentary expences and legacies, and also to pay the legacy duty, payable upon or in respect of the specific and pecuniary legacies, and yearly sum given by his will and bequeathed to or in trust for the said *Sarah Morris*. The testator died in *May* 1834, and *Sarah Morris* in *October* 1836.

Sarah Morris, and the several persons to whom the fund was bequeathed on her death, were strangers in blood to the testator, and their legacies were therefore all subject to the duty of 10*l.* per cent. A sufficient amount of stock to meet the annuity had been ordered to be set apart, and a part of it had also been ordered to be transferred to the petitioners; a question was now raised, whether the legacy duty payable by the petitioners, in respect of the bequest, was payable out of the trust fund, or out of the testator's residuary estate.

Mr. *Pemberton*, for the petitioners, contended that the legacy duty was to be paid, when the trust fund was invested, out of the residue of the testator's estate; and that on the death of *Sarah Morris*, the whole of that trust fund thus relieved from legacy duty was bequeathed to the petitioners, and the other legatees in remainder. He referred to the stat. 36 *G.* 3. *c.* 52. *s.* 12, 13.

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CALVERT v. SEBBON.

Mr. *Swanston* and Mr. *J. Russell* for the residuary legatee, insisted that the bequests to *Sarah Morris*, were alone exempted from payment of the legacy duty; that the rights of the legatees, ought not to be affected by provisions, which had been introduced into an act of parliament, merely for the purpose of arranging the mode in which legacy duty should be paid. If the Court approved of the construction which had been put upon the statute by the petitioners, these legatees would be in a better position with respect to the legacy duty, in consequence of being strangers in blood, to the testator, than they would have been in if they had been related to him.

Mr. *Pemberton*, in reply.

The MASTER *of the* ROLLS.

The testator directed a sufficient amount of stock to be invested, to produce a clear sum of 200*l.* a year. The Court is to accomplish the intention of the testator. It became the duty of his personal representatives, to invest out of the residue, a clear sum which would produce 200*l.* a year. When that had been done, *Sarah Morris* was to receive the benefit of that sum for her life; but in order to accomplish that purpose, the representatives of the testator had to pay the full amount of the legacy duty, which the testator had expressly directed should be paid out of his residuary estate. The question is, when this legacy duty has been so paid, is the residuary legatee entitled to call any part of it back again? I think he is not.

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HUTCHINSON *v.* TOWNSEND.

1836.
Dec. 16.

Parties entitled to one fourth of an ascertained fund, vested in trustees, held entitled to sue for their one fourth share, without making the parties entitled to the other three fourths parties to the suit.

THE testator in this case devised and bequeathed his real and personal estate to *Robert Sherson* and *Bury Hutchinson*, in trust to convert the same, and to divide the produce between his son *Bury Hutchinson*, *Elizabeth Ursula Hutchinson*, and his three other daughters. The testator declared, that his trustees should hold his daughters' shares, for their separate use, for life, with remainder for their children; and in case any one or more of his said four daughters should happen to die, without having or leaving any child or children, who should happen to become entitled to a vested interest, in the share or shares of and in the estate, and effects, thereby provided for such child or children respectively: then, he thereby ordered his trustees, to stand possessed of such share, or shares, in trust for such his other children, as should be then living, including his said son, *Bury Hutchinson*, and the child or children of any of them, who should happen to be then dead, leaving issue, equally to be divided between or among them, if more than one, share and share alike; the children to take their parent's share. Separate powers for the appointment of new trustees were given, as to the share of each daughter.

After the death of the testator, his will was proved by *Bury Hutchinson* alone, who set apart certain sums as the shares of *Elizabeth Ursula Hutchinson*, and the other daughters. The share of *Elizabeth Ursula Hutchinson* was vested in *Bury Hutchinson* together with *Edward Townsend*, who was appointed a new trustee; and the trusts of the appropriated fund, or any further sum,

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which might thereafter be appropriated, were duly declared by a deed, dated in 1808. *James Townsend*, who was subsequently appointed a new trustee, ultimately became the last surviving trustee of the funds.

Elizabeth Ursula Hutchinson died in *October* 1834, unmarried, and her share thereupon became divisible between her brother and sisters, or their children; and *Bury Hutchinson* having previously died in 1824, one fourth part of the share of *Elizabeth Ursula Hutchinson* in the appropriated funds, devolved under the limitations in the will of the testator, upon the children of *Bury Hutchinson*, who were represented by the Plaintiffs in this suit.

By this bill filed against *James Townsend*, the surviving trustee of the fund in question, they prayed payment of the one fourth part of the funds standing in the name of *James Townsend*, and which had been appropriated to *Elizabeth Ursula Hutchinson;* these consisted in the whole of the sum of 12,906*l.* 16*s.* 9*d.* consols, 952*l.* 2*s.* 6*d.* reduced, and 161*l.* 15*s.* 2*d.* bank stock.

The Defendant, by his answer, stated, that on the 9th of *June* 1835, another bill was filed against him in this Court, praying generally, to have the said testator's will established, and the trusts thereof executed; and to have general accounts taken, of all the real and personal estate and effects of the said testator; and to have the same administered under the direction of the Court; and in which bill, claims were made, at variance with the claim set up by the said bill of the said Plaintiffs, and which other suit was also then depending; and under the circumstances, the Defendant was advised, that he could not safely execute the said trusts, or comply with the Plaintiff's requests, except under the direction of the Court; and

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and he submitted, that the Plaintiff's suit was insufficient in its frame, and defective for want of parties: as the relief they sought, was confined to one fourth part or share of the several sums of 12,906*l.* 16*s.* 9*d.*, 9521*l.* 2*s.* 6*d.*, and 161*l.* 15*s.* 2*d.*, alleged to have been invested for the one fourth share of *Elizabeth Ursula Hutchinson* deceased, of and in the residuary estate of the said testator; whereas, the Defendant submitted, that the several persons interested in the remaining three fourth parts or shares, of the several specific trust funds, were necessary parties to the said bill; and moreover, that the said bill ought not to be confined to those specific sums, but ought to extend generally, to the ascertaining of the whole share of the said *Elizabeth Ursula Hutchinson* deceased, of and in the residuary estate of the said testator; and that all the persons then interested in the said residuary estate, would be necessary parties to the said suit for that purpose.

The cause came on for hearing, when

Mr. *Girdlestone*, for *James Townsend* the trustee, objected to this suit for want of parties: and contended, that the Court would not deal with this fund in parts, so as to occasion a multiplicity of suits; for if the present proceedings, which only related to one undivided fourth part of the fund, were allowed to proceed, there would be nothing to prevent the parties, entitled to the other three fourths, instituting separate suits for their distinct portions. That if the principle were once admitted, the only limit to the number of suits respecting the same fund, would be the number of claimants on it. He also contended, that the other existing suit formed an objection to this suit proceeding; and that it did not appear that the whole property of the testator had been divided and appropriated.

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Mr. *Pemberton* and *Wilbraham*, for the Plaintiffs, and Mr. *Kindersley* and Mr. *Paton*, for a Defendant in the same interest, contended, that the fund having been ascertained and set apart, now formed no part of the testator's estate; they relied on the case of *Smith* v. *Snow*. (*a*) In that case, the Plaintiff was entitled to one seventh of certain funds, standing in the name of trustees; and he filed his bill against the trustees, and the *cestuis que trust* of the other six sevenths, to have the one seventh transferred; four of the parties entitled to the other sevenths demurred for want of equity, and Sir *John Leach* allowed the demurrer. That case, they contended, shewed that it would have been improper to have made the several parties entitled to the other portions of the funds parties to this suit, and was an express decision in favour of the correctness of the frame of the present bill.

The MASTER *of the* ROLLS said, that it would be very inconvenient to encourage suits of this description; but considering the decision of the Vice-Chancellor in the case cited; and that these funds had been distinctly appropriated, and that one fourth belonged to these persons, he must overrule the objection. His Lordship observed, that he should, however, be sorry to see suits generally, constituted as this was.

(*a*) 3 *Mad.* 10.

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TABBERNOR *v.* TABBERNOR.

Nov. 2.

A Bill having been filed without the authority of one of the Co-plaintiffs, the Court, after replication, ordered his name to be struck out as Co-plaintiff, and the costs of suit and of the application to be paid by the solicitor who filed the bill.

THIS was a motion, made after replication, on behalf of Mr. *William Tabbernor*, one of the Co-plaintiffs in the suit, that his name might be struck out as one of the Plaintiffs to the bill filed in this cause; and that his costs of suit and of this application might be paid by the solicitor who filed the bill.

It appeared, on affidavit, that *William Tabbernor* had been made a Co-plaintiff in the suit without his authority, sanction, or concurrence; and from circumstances discovered by him, it appeared, that his interests in the matters of the suit, were quite adverse to those of the other Co-plaintiffs.

Mr. *Pemberton* and Mr. *Burge*, in support of the motion.

Mr. *Wright*, for the solicitor who had filed the bill, admitted that there had been no distinct authority given to commence proceedings; but he contended, that inasmuch as Mr. *Tabbernor* had sanctioned some other proceedings relative to the subject matter of the suit, the solicitor ought not to be visited with the costs.

Mr. *Lowndes*, for the only Defendant within the jurisdiction, did not object to the motion, but asked for his costs of appearance.

The MASTER *of the* ROLLS.

There is no doubt in this particular case, although there is sometimes a difficulty, where a party has, by

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TABBERNOR v. TABBERNOR.

acquiescence, entitled the Defendants to protection as to the costs. The question is, whether Mr. *Tabbernor* is bound to remain in conjunction with the other Plaintiffs, or whether he is to be released from that union. There is evidently a question on the bill, between *William Tabbernor* and the other Plaintiffs; and there being such a question, it cannot be discussed between the Co-plaintiffs; he is therefore entitled to be severed. But at whose cost is he to be relieved? The first consideration is, whether *Keene*, the solicitor, had authority from *William Tabbernor* to file a bill: — It is admitted that he had not; *Keene* is therefore answerable. According to the strict practice, there ought to be a warrant in writing to authorise the solicitor to commence proceedings; it is sometimes, however, dispensed with, at the peril of the solicitor; had the party here acquiesced, it would be another question: but no such point arises, there is no proof of any acquiescence, and without any imputation on the solicitor, who probably conceived that he did the best, yet he has done an act for which he had no authority, and the application must, therefore, be granted with costs.

1838. *July* 23.

The ATTORNEY-GENERAL *v.* WILSON.

It is contrary to the policy of the Mortmain Acts and to the usual practice of the Court, to allow money belonging to a charity to be invested in land, even for the purpose of enlarging the charity.

THE object of this information was to carry into execution certain charitable trusts founded by the will of *Dorothy Wilson*, dated in 1710. By the decree of the 19th *February* 1834, it was referred to the Master,

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Master, to settle and approve of a proper scheme for the management of the charity estates, and enlargement of the charities; and for the application of the future rents and profits of the same estates; and the proper regulation of the schools and hospitals; and the Master was to state such scheme, with his opinion thereon, to the Court. The Court reserved to itself, the consideration, whether for the purpose of effectuating such scheme, it might or might not be necessary to apply for the aid of parliament.

By the report, dated the 6th of *March* 1838, the Master certified, amongst other things, that the relators had submitted to him, that the present hospital at *Foss Bridge End*, was only adapted for the reception of ten poor women; but besides the rooms occupied by such women, there was a room in which the meetings of the trustees were held; and a school-room, in which the boys were taught; and the dwelling-house, in which the schoolmaster resided, immediately adjoined the said hospital.

That in order to furnish accommodation in the said hospital for the reception of six women, over and above the number limited by the testatrix's will, thereinafter proposed to be admitted, the relators had submitted, that the said dwelling-house occupied by the master, and the said room used for the meeting of the trustees, should be respectively altered and fitted up, so that each of the said six additional women, might have a room appropriated for her own residence. That as the schoolmaster, was required by the testatrix's will, to read prayers daily, to the inmates of the hospital, the trustees had submitted, that in order to enable him to comply with the testatrix's directions, in that respect, and to attend to

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to his duties as schoolmaster, it was expedient that he should have a residence provided for him, adjoining to, or near the hospital, and that the school for the boys, should be contiguous to his residence. That there were five freehold cottages, and a court or yard, and certain out-buildings thereto belonging, situate near *Foss Bridge*, in the city of *York*, belonging to *William Whitehead*, which immediately adjoined upon the hospital, buildings, and premises at *Foss Bridge End;* and the relators were advised, that by taking down part of the said cottages and buildings, and with a portion of the yard belonging to the hospital, an eligible site would be afforded, whereon to erect a school-house, sufficient for the accommodation of sixty boys, together with a house, suitable for the residence of the schoolmaster and his family. That the said *William Whitehead* had offered to sell to the relators, the fee simple and inheritance, of the cottages and premises abovementioned, for the sum of 600*l.*; and the estimated expense of building a new school-house and schoolmaster's house, and of making the alterations in the hospital and present schoolmaster's house, and fitting up the same as thereinbefore mentioned, would not altogether exceed the sum of 500*l.* And the said relators therefore proposed, the following, as part of the scheme, for the management of the charity estates, and enlargement of the said charities, and for the application of the future rents and profits of the said estates, and the proper conduct and regulation of the said several schools and hospital; that is to say, that in order to furnish accommodation in the said hospital, for the reception of six additional women, the dwelling-house occupied by the master, and the room used for the meeting of the trustees, should be altered and fitted up, so that each of the said additional women, might have

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have a room appropriated for her own residence. That in order to enable the schoolmaster, to perform the duties imposed on him by the testatrix's will, he should have a residence provided for him. That the five cottages and land belonging to *William Whitehead*, should, on a good title being made thereto, be purchased for any sum not exceeding the sum of 600*l.*; and that, on the site thereof, a school-house sufficient for the accommodation of sixty boys, together with a house, suitable for the residence of the schoolmaster and his family, should be erected at an expense not exceeding the sum of 500*l.*

The Master approved of the scheme; and the cause coming on for further directions, it was proposed, that the report of the Master, and the scheme therein approved of, should be confirmed.

The charity property, it appeared, consisted of land producing 580*l.* a year, and 1720*l.* 3 per cent. annuities.

Sir *C. Wetherell* and Mr. *O. Anderdon*, for the relators.

Mr. *Wray*, for the Attorney-General.

The question which arose, was whether it was consonant with the policy of the Mortmain Acts, and the usual practice of the Court, to order charity funds to be laid out in the purchase of land, which would thus become unalienable.

The

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The second section of the Mortmain Act, 9 *G.* 2. *c.* 36. (*a*), and the *Attorney-General* v. *The New England Company* (*b*), were relied on.

The

(*a*) By this act, which is entitled, "*An Act to restrain the disposition of lands, whereby the same becomes unalienable;*" after reciting "that gifts or alienations of lands, tenements, or hereditaments in mortman, are prohibited or restrained by *Magna Charta*, and divers other wholesome laws *, as prejudicial to and against the common utility; nevertheless, this public mischief had of late greatly increased, by many large and improvident alienations, or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs;" for remedy whereof it is enacted, that from and after the 24th of *June* 1736, no manors, lands, &c. nor any sum, &c. or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, &c. "shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anyways conveyed or settled to or upon any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever;" unless such gift, conveyance, &c. be made by deed. in the presence of two witnesses, twelve calendar months at least before the death of such donor or grantor, and be enrolled in Chancery, within six calendar months after the execution thereof; and unless such stocks be transferred six calendar months before the death of such donor or grantor, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, &c. for the benefit of the donor or grantor, or of any person or persons claiming under him.

The second section provides, "that nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds, twelve calendar months at

* See *Magna Charta*, 9 *Hen.* 3. *c.* 36., 7 *Ed.* 1. *st.* 2., 13 *Ed.* 1. *c.* 32., 15 *Ed.* 1. *c.* 33., 15 *Ed.* 1. *c.* 41., 18 *Ed.* 1. *st.* 1., *c.* 3., 27 *Ed.* 1. *st.* 2., 34 *Ed.* 1. *st.* 3., 18 *Ed.* 3. *st.* 3. *c.* 3., 15 *R.* 2. *c.* 5., 21 *Hen.* 8. *c.* 6. *s.* 5., 23 *Hen.* 8. *c.* 10., 1 & 2 *Ph. & Mar. c.* 8. *s.* 51., 35 *El. c.* 7. *s.* 27., 39 *El. c.* 5., 43 *El. c.* 4., 21 *Jac. c.* 1., 13 & 14 *Car.* 2. *c.* 12., 17 *Car.* 2. *c.* 3. *s.* 7., 22 *Car.* 2. *c.* 6. *s.* 10., 29 *Car.* 2. *c.* 8., 7 & 8 *W.* 3. *c.* 37.

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The Master *of the* Rolls (after stating the circumstances of the case).

It is contended, that under the second section (*c*) of the 9 *G.* 2. *c.* 36., the proposed purchase of additional land may lawfully and properly be made, out of the 3 per cent. annuities now belonging to the charity.

In support of the argument, the case of the *Attorney-General* v. *The New England Company*, which was heard before Lord *Eldon* on the 8th of *August* 1808, was cited. The *New England* Company possessed land of the value of 1250*l.*, they had a licence to hold land in mortmain, to the value of 2000*l.*, and the Master approved of a scheme, whereby it was proposed, that certain *South Sea* stock, and 3 per cent. annuities should be sold, and the money to arise from the sale thereof, should be laid out in the purchase of land in *Great Britain* for the benefit of the charity; Lord *Eldon* confirmed the report, and ordered that when a proper purchase should offer, wherein to lay out the accumulations of the charity fund, in *Great Britain*, the Defendants were to be at liberty to apply to the Court, as they should be advised. It does not appear, that anything else was done in the cause, nor upon what argument, or under what circumstances, the order was made; and after considering the second clause of the statute, and the observations

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at least before the death of the grantor, or to the transfer of any stock, six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion."

(*b*) The circumstances of this case are stated in his Lordship's judgment.

(*c*) The object of this section is declared by the statute of 9 *G.* 4. *c.* 85.

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observations of Lord *Hardwicke* in the case of *Vaughan* v. *Farrar* (*a*), it appears to me, that although such a purchase as is now proposed, might be lawful, yet that it would be contrary to the policy of the statute, and contrary to the usual practice of this Court, to sanction it; and I am therefore of opinion, that I cannot approve of the scheme and confirm the report, without a qualification or exception, as to that part, which relates to the proposed purchase, and referring it back to the Master, to approve of some other mode of providing an addition to the school, and a residence for the schoolmaster.

(*a*) 2 *Ves.* sen. 182.

June 23.
Aug. 9.

KEMP *v.* WADE.

The Master's certificate of a Defendant's default in the production of papers, founded on an admission contained in the answer of another party, is irregular.

Where the four day order has issued upon an irregular certificate of default, in the production of papers, before the Master, the proper course is to apply to the Court to discharge the order, and take the certificate off the file; and not to take exceptions to the Master's certificate.

JAMES MACKAY, one of the Defendants in this cause, by his answer, denied that he had in his possession any papers, &c., relating to the matters in question, except the probate of the will of *George Mackay*.

By the decree, it was ordered that the parties should produce before the Master upon oath, all deeds &c., in their custody, or power, relating to the matters in question; and should be examined on interrogatories, as the Master should direct.

James Mackay was examined upon interrogatories in the Master's office, but his answer contained no further admission of the possession of documents.

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The answer of a Mr. *Rowson*, who had been originally a Defendant to the suit, but had been dismissed at the hearing of the cause, was read in the Master's office, as evidence of *Rowson*'s having in his possession on behalf, and as the solicitor of Mr. *James Mackay*, of several deeds and writings, and to shew that they were really in the custody or power of *Mackay*. These deeds and writings not having been produced by *Mackay*, the Master issued his certificate of default, whereby he stated, that the answer of *Rowson* sworn in this cause, and the answer of the Defendant *Mackay*, and his examination being read before him, he (the Master), humbly certified "that *Mackay* had not, pursuant to the decree, produced before him, all or any of the books, papers, or writings in his custody or power, relating to the matters in question in this cause; although he had been duly summoned so to do," except the probate which he had left in his office.

The four day order thereupon issued, whereby *Mackay* was ordered within four days after notice to his clerk in Court, to produce before the Master all books, papers, and writings, in his custody or power, relating to the matters in question in the cause; or in default, that the Serjeant-at-arms should apprehend him, and bring him to the bar of the Court to answer his contempt.

A motion was now made on behalf of *Mackay*, to take the certificate off the file, and to discharge the four day order.

Mr. *Pemberton* and Mr. *Walker*, for the motion, cited *Jones* v. *Powell*. (*a*)

Mr.

(*a*) 1 *Sim.* 387.

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Mr. *Tinney*, *contrà*, contended that the objection ought to be taken by way of exception to the Master's certificate, and not by motion; he cited *Chennell* v. *Martin*. (*a*)

The MASTER *of the* ROLLS.

This was a motion to take the Master's certificate off the file, and to discharge the four day order, which had been issued upon it.

The certificate was of the Defendant's default, in the production of deeds, papers, and writings in his possession.

It was objected, that in the proceedings, the Master had charged the Defendant, with the possession of deeds, not upon any statement, admission, or examination of himself, but on evidence consisting of the answer of another Defendant.

The objection appears to me to be founded in fact, and to be valid. (*b*)

But an objection was then made to the regularity of the application; and it was urged, that exceptions ought to have been taken to the Master's certificate. Upon this point I took time for inquiry, and the Masters have done me the favour, to give me their assistance, upon a point, which materially affects the practice of their offices; and they state to me, that the mode of proceeding in cases of a certificate of default in not producing deeds, &c., is for the party applying for the production, to obtain the usual four day order, and then for the other party to apply to the Court to discharge the order, and take the certificate off the file.

(*a*) 4 *Sim.* 340. (*b*) See *Hoare* v. *Johnstone*, *antè*, 553.

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PEACOCKE *v.* PARES.

July 4. 20.

Construction of a clause of accruer "in case of any younger son becoming an eldest or only son."

An estate was limited to *A.* for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of *A.*; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. *A.* had two sons, *B.* and *C.*, and one daughter; *B.* attained twenty-one, suffered a recovery, whereby he destroyed *C.*'s estate in remainder: *B.* died in 1807, leaving *C.*, an infant, to whom he devised the estate for his life. *A.* died in 1833: Held, that *C.* was not entitled to participate in the portion.

BY this suit, the Plaintiff, *Amelia Peacocke*, claimed, under the settlement made on the marriage of her father Sir *Thomas Hussey Apreece* deceased, to be entitled to a portion of 6000*l.*, to be raised out of the estates comprised in that settlement, by means of a term of 500 years vested in the Defendants *Pares*, and *Samuel* and *Thomas Miles*. The Defendant Sir *Thomas George Apreece* was now, under another title, tenant for life of these estates, subject to the term: and he admitted that the Plaintiff, Mrs. *Peacocke*, was entitled to a portion of 4000*l.*, but insisted that she was not entitled to 6000*l.*

By the marriage settlement dated in 1771, the estates were limited to Sir *Thomas Hussey Apreece* for life; with remainder to trustees to preserve contingent remainders; with remainder to trustees for a term of ninety-nine years, to secure a jointure to his wife; with remainder to the trustees for a term of 500 years; with remainder to the first and other sons of the marriage in tail male; with remainders over; and it was declared, that the estates were vested in the trustees for 500 years, on trust, in case there should be any child or children of the said *Thomas Hussey Apreece*, by the said *Dorothea Ashby* (other than and besides an eldest or only son), then the said two trustees should raise and levy, such sum and sums of money, for the portion and portions of all and every such child and children, (other than and besides an eldest or only son), as were thereinafter mentioned, (that is to

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to say); in case there should be but one such child, then the sum of 6000*l.* for the portion of such one child; to be paid at such times, and in such manner as the said *Thomas Hussey Apreece* should in manner therein mentioned appoint; and in default of such appointment, to be paid to, and in such case, to be an interest vested in such child, being a son, at his age of twenty-one years, and being a daughter, at her age of twenty-one years or day of marriage, which should first happen; and in case there should be two such children, and no more, then the sum of 8000*l.* for their portions; and in case there should be three or more such children, then the sum of 12,000*l.* for their portions; the said portions for two or more such children, to be paid and payable, to and between, or among them, in such shares, and in such manner, as the said Sir *Thomas Hussey Apreece* should, in manner therein mentioned, appoint; and in default of such appointment, then the same to be equally divided between or among them; the portions of two such children or more, in case of no appointment to the contrary, to belong to, and be an interest vested in such of the said children, as should be a son or sons, at his or their respective age or ages of twenty-one years; and in such of them as should be a daughter or daughters, at her and their respective age or ages of twenty-one years, or day or days of marriage, which should first happen; but to be payable and paid at the times thereinafter mentioned, (that was to say), the portion and portions of such younger son or younger sons, to be paid to such of them, as should be under the age of twenty-one years at the time of the death of the said *Thomas Hussey Apreece*, when, and as, they should respectively attain the age of twenty-one years; and to such of them as should attain the age of twenty-one years, in the lifetime of the said *Thomas Hussey Apreece*, at the end of six calendar months next after his decease; with interest from his death, after the rate

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rate of 3*l.* for every 100*l.* for a year. And the portion and portions of such daughter and daughters, to be paid to such of them as should be under the age of twenty-one years, and unmarried, at the time of the death of the said *Thomas Hussey Apreece*, at her and their respective age or ages of twenty-one years, or day or days of marriage, which should first happen; and to such of the said daughters, as should attain the age of twenty-one years, or be married in the lifetime of the said *Thomas Hussey Apreece*, at the end of six calendar months next after his death, with interest from his death.

The settlement contained the following proviso: — Provided always, and it is hereby agreed and declare that in case any of the younger sons, entitled to the portions under the trusts of the said term of 500 years, shall happen to die under the age of twenty-one years, or become an eldest or only son; or any of the daughters, shall happen to die under the age of twenty-one years and unmarried; then the portion or portions, hereby provided for every such child so dying, and for every such younger son so becoming an eldest or only son, shall, from time to time, accrue and belong unto, and vest in, the survivors or survivor, or others and other of the said children; to be equally divided between or among them, if more than one, and paid at such times, and in such manner, as is hereinbefore directed and provided, concerning his, her, and their original portion or portions; or so soon after, as such event or events shall happen; so as, in case there be but two such surviving or other children, they shall have no more than the sum of 8000*l.* between them for their portions; and in case there be but one such surviving or other child, he or she shall have no more than the sum of 6000*l.* for his or her portion, by virtue of or under the

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trusts, of the said term of 500 years. Provided also, and it is hereby further agreed and declared, that if any sum or sums of money, shall, by virtue of the proviso herein last before inserted and contained, vest in, and devolve upon, any such child or children, by way of survivorship or accruer as aforesaid: then, all such sum and sums of money, so vesting, devolving, and accruing as aforesaid, shall from time to time, as the case shall so happen, be subject and liable to such further right, condition, and contingency of accruer or survivorship, in favour, and for the benefit of the surviving, and other and others of the said child and children, as is hereinbefore declared, of and concerning the original portion and portions, of any of the said child and children as aforesaid; so as, in case there be but two such surviving or other children, they shall have no more than the sum of 8000*l.* between them, and if there shall be but one such surviving or other child, he or she shall have no more than the sum of 6000*l.* by virtue of or under the said trust. Provided always, and it is hereby agreed and declared, that no sale or mortgage shall be made by the trustee or trustees of the said term of 500 years, for the time being, of any part of the premises comprised in the same term, until some or one of the portions, to be raised under the trusts of the same term, shall become payable, or be directed to be paid as aforesaid.

There were three children of the marriage, Sir *Shuckburgh Ashby Apreece* the eldest son, *Thomas George*, now the Defendant, Sir *T. G. Apreece*, the only other son, and the Plaintiff Mrs. *Peacocke*, the only daughter.

On the 17th *December* 1794, *Shuckburgh Ashby Apreece* attained his age of twenty-one years. He was tenant

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tenant in tail in remainder, and in *September* 1798, being about to marry, it was agreed between him and his father, the tenant for life, to bar the estates tail limited by the settlement of 1771. Recoveries were accordingly suffered; the estates tail created by that settlement were barred and destroyed; and it was declared, that subject to the term of ninety-nine years for securing the jointure, and the term of 500 years for securing portions, the same recoveries should enure to the uses expressed in an indenture dated the 29th day of *September* 1798, being the settlement made on the marriage of *Shuckburgh Ashby Apreece*. The uses, after a life estate in part of the property to Sir *Thomas Hussey Apreece*, were declared to *Shuckburgh Ashby Apreece* for life, with remainder (which never took effect) to the children of his marriage, with remainder to *Shuckburgh Ashby Apreece* in fee.

The ultimate remainders being thus limited to *Shuckburgh Ashby Apreece* in fee, and in the events which happened, the limitations to his children not having taken effect, *Shuckburgh Ashby Apreece* became (subject to the life interest of his father, Sir *Thomas Hussey Apreece*, in a portion of the estates, and to the incumbrances to which all the estates were subject,) absolutely entitled to them for his own use.

Under these circumstances, *Shuckburgh Ashby Apreece* made his will; and thereby he devised the estates, subject to the prior limitations and incumbrances, to the use of his brother, the Defendant Sir *Thomas George Apreece*, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Sir *Thomas George Apreece* in tail male, with remainders over.

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The testator *Shuckburgh Ashby Apreece* died on the 5th of *October* 1807, without having had issue, leaving the Defendant Sir *Thomas G. Apreece*, his only brother, then under the age of twenty-one years, him surviving.

Mrs. *Peacocke*, his only sister, had married in *August* 1801. Sir *Thomas Hussey Apreece*, the father, lived till 1833, and died on the 27th of *May* in that year, without having exercised any power, which he had, to affect the portions; and upon his death, the portion or portions, secured by the term of 500 years, became payable as in default of appointment.

Mr. *Tinney* and Mr. *Sidebottom*, for the Plaintiff, contended, that on the death of *Shuckburgh Ashby Apreece*, Sir *Thomas George Apreece*, having become the only son, ceased to be entitled to any portion; and that Mrs. *Peacocke*, as the only daughter, was entitled to a portion of 6000*l.*

That where portions are provided for younger children, to the exclusion of the eldest, the vesting even, of portions, was only *sub modo*, there being an implied condition annexed to such vesting, that the party claiming, should continue to bear the character of younger child, down to the time of division. That if any younger child, were before the period of division, to become an elder son, and thus no longer answer the description of a younger child, within the intention of the settlement, his share became divested and accrued to the other younger children. That in this case, nothing had vested in Sir *Thomas George Apreece*, at the time of his becoming an eldest son; but even if it had vested, still when a provision is made for a class of persons, to take effect at a future period, they must be ascertained, not at the period of vesting, but at the period of distribution, and must

must sustain the character which qualifies them at the same period.

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In *Matthews* v. *Paul* (*a*), the testatrix bequeathed certain Imperial terminable annuities, in trust to accumulate until their expiration (1819); and thereupon to assign the accumulated fund, "amongst all and every the children of her daughter, if more than one, (except an eldest son), equally, share and share alike. *John*, the eldest son, was tenant in tail of a considerable estate, which, on his death, did not descend to his brother *Walter*, but was devised to him after suffering a recovery; between the death of the testatrix and 1819 *John* died, whereby *Walter* became the eldest son: it was held that *Walter*, who sustained the character of eldest son at the time of payment, was not entitled to share in the fund, although the settled estate did not descend to him. This case settled the rule, as to the time at which the character of elder or younger child was to be ascertained. That it was true, and it would probably be relied on by the Defendant, that in *Matthews* v. *Paul*, the principal estate was not devised by the will to the eldest son, but was settled by some other instrument, and was devised by *John* to his father: but that circumstance, however, made it a stronger authority in favour of the Plaintiff; for *Walter*, who took no other provision under the will, in lieu of his portion, was excluded from participating in the fund, in consequence of his not sustaining the prescribed character, at the period of distribution.

That the Court must construe this settlement, without reference to the subsequent events; and the fact of a recovery having been suffered by the first tenant in tail, which defeated the subsequent limitation to the Defendant, could not have the effect of altering the construction,

(*a*) 3 *Swan.* 328.

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tion, which, independently of that circumstance, the limitations would have received.

Mr. *Pemberton* and Mr. *Calvert*, *contrà*.

In all cases of this description, the Court struggles to carry into effect the general intention of the settlor, not only that no child shall take a double portion under the settlement; but also that each and every of them shall take some provision thereunder. In construing clauses divesting portions on becoming an elder child, eldership in respect to age is not regarded, but eldership in estate only. Thus, in *Duke* v. *Doidge* (*a*) it was said by the Court, "that every child, except the heir, is considered in equity as a younger; and that eldership, not carrying the estate along with it, is considered not such an eldership, as shall exclude by virtue of such clauses; and it would be hard that the right of eldership should be taken away, and yet not have the benefit of it as a younger child;" in that case, the estate went by appointment to the third son, and the eldest, being thus deprived of the estate, was considered a younger child. So also in *Beale* v. *Beale* (*b*), an eldest daughter, where the estate went to a remainder-man, was held a younger child in equity. Great latitude is extended to cases of this description. In *Emery* v. *England* (*c*), under a bequest to a younger child, an only child was held entitled.

The estate limited by the settlement to Sir *Thomas George Apreece*, after the estate to his brother *Shuckburgh*, was destroyed by the recovery; Sir *Thomas* took the estate through the bounty of his brother, and not under the settlement, he is not therefore an elder son within the meaning of the settlement; and he will take no provision whatever under the settlement, unless he is allowed to recover a portion as a younger child.

Matthews

(*a*) 2 *Ves.* sen. 203. (*b*) 1 *P. Wms.* 244. (*c*) 3 *Ves.* 231.

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Matthews v. *Paul* cannot govern the present case; there, the only question was, at what period the qualification of being a younger son, was to be ascertained; and whether at the date of the will, the death of the testatrix, or the time when the fund was directed to be distributed. No principal estate had been settled in that case; nor had the interest of the second son, as in the present case, been defeated by his elder brother.

The estate which Sir *Thomas George Apreece* takes under the will of his brother, is different in its nature and in extent to that provided for him by the settlement. If he had taken under the latter, he would have been entitled to an estate tail, now convertible into an absolute estate in fee simple; but under the will, he takes an estate for life only; in the case of *Fazakerly* v. *Ford* (*a*), it was held, that a shifting clause did not take effect, because the estate upon the devolution of which, the other estates were to go over, did not descend unfettered, but came encumbered with a term, for securing a jointure and portions.

The sum of 8000*l.* is therefore raiseable under the trusts of the term, 4000*l.* of which belong to the Defendant Sir *Thomas George* as a younger son, otherwise unprovided for by the settlement; and the remaining 4000*l.* to the Plaintiff.

The cases of *Windham* v. *Graham* (*b*), *Teynham* v. *Webb* (*c*), *Hall* v. *Hewer* (*d*), *Loder* v. *Loder* (*e*), *Driver* v. *Frank* (*g*), *Chadwick* v. *Doleman* (*h*), *Broadmead* v. *Wood* (*i*), and 1 *Roper on Legacies*, 52—55., were also cited.

The

(*a*) 4 *Sim.* 390.
(*b*) 1 *Russ.* 331.
(*c*) 2 *Ves.* sen. 198.
(*d*) *Amb.* 202.
(*e*) 2 *Ves.* sen. 530.
(*g*) 3 *M. & Selw.* 25. *S. C.* 6 *Price*, 41., and 8 *Taunt.* 468.
(*h*) 2 *Vern.* 528.
(*i*) 1 *Bro. C. C.* 77.

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The MASTER *of the* ROLLS (after stating the circumstances.)

The Plaintiffs alleged, that on the death of *Shuckburgh Ashby Apreece*, Sir *Thomas George Apreece* having become the only son, ceased to be entitled to any portion; and that Mrs. *Peacocke*, as the only daughter, became entitled to a portion of 6000*l.*

The Defendant, Sir *T. G. Apreece*, alleged, that the estates tail, limited by the settlement, having been barred and destroyed, he will take no provision under the settlement, if he be not allowed to recover a portion as a younger child; and that according to the rules of construction, adopted in such cases, he ought not to be excluded.

The effect of including him would be to make 8000*l.* raisable for himself and his sister, and to reduce Mrs. *Peacocke*'s portion.

There are many cases upon settlements and on wills providing for families, in which the Court has looked upon elder children as younger, and upon younger children as elder: it is presumed in these cases, that it was intended by the settlement or will, to make provision for all the children, and not to give a double provision to any; and to effectuate this intention, the child, taking the estate under the will or settlement, is considered, in equity, as the eldest, and every other child as younger. And in one of the cases, it is said, that eldership, not carrying the estate along with it, is not such an eldership, as shall exclude, by virtue of clauses excluding the elder, from the provision intended for younger children.

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But when it is said, that an elder child, unprovided for, shall be deemed a younger, it means, I conceive, an elder child unprovided for by the settlement or will itself: or by means, which were in the contemplation of the parties, making the settlement or will.

In the present case, the estate was strictly settled. If the estate tail vested in the eldest son of the marriage, had not been barred, the second son, when he became eldest son, would have become entitled to the family estate under the settlement; and would not, in that event, have become entitled to any portion: he would not, it is admitted, take the estate and a portion also.

As the second son became eldest or only son, before he attained twenty-one years, *i. e.* before he acquired a vested interest in his presumptive portion, the question whether a previous portion, was devested on his becoming an only son, does not arise; but the fact that the second son, whilst he sustained that character, never had a vested interest in the portion, does not appear to me to be immaterial; when he attained his age of twenty-one years, his elder brother was dead without issue; and he was, according to the limitations of the settlement, if they had not been defeated, entitled to the settled estates in tail, in immediate remainder, after the life estate of his father.

The estate, which he would have enjoyed under the settlement, was defeated, by means incident to the estates created by the settlement; but not by any defect of the settlement itself, in providing the means to carry the intention into effect. It does not appear to me, that the event of the recoveries being suffered by the tenant for life, and the first remainder man in tail, to bar the limitations of the settlement, can reasonably be considered,

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to have been in contemplation, at the time when the settlement was made; so as to entitle the only son, to the benefit of that which has been called the prodigious latitude of construction, which has been adopted in these cases, and appears to be founded on the presumption, that it was intended to provide for all the children of the marriage. That presumption, is always to be had in view, and ought, I apprehend, to be acted upon, in all cases, in which a loss of provision occurs, by an event which can properly be supposed to have been in the contemplation of those, by whom the settlement was made, and within their intention to provide for.

All the cases appear to me to be consistent with that view. None of them go the length of deciding, that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction, upon the presumption to which I have referred; and the case of *Matthews* v. *Paul* decides the contrary. The difference between that case and the present, is that in the case of *Matthews* v. *Paul*, the eldest son was not entitled to the estate, under the same instrument which gave the portions; but that difference does not appear to me to be material. The grandmother, at a time when the eldest son was entitled to an estate tail, gave the portions to the younger children; after her death, the eldest son died, having suffered a recovery of the estate tail, and devised the estate to his father: upon his death, the second became eldest; he had no estate, and yet was excluded from any share of the portions. In this case, as in the case of *Matthews* v. *Paul*, it has been suggested that inconveniences and hardships might, in particular events, have resulted, from any mode of continuing this settlement; and it must, I think, be admitted, that no mode of construction, can make the settlement wholly free from objection, in every

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every event that might have occurred; but, on the best consideration which I can give to the case, it appears to me, that the Defendant, Sir *Thomas George Apreece*, having become an only son, is not, upon the true construction of this settlement, entitled to any share of the portions provided for the younger children of the marriage; and that Mrs. *Peacocke*, as the only younger child, is entitled to a portion of 6000*l.*; and consequently, that the trustees of the 500 years' term must be directed to raise that sum, and pay the same to the trustees of Mrs. *Peacocke*'s settlement.

See *Spencer* v. *Spencer*, 8 *Sim.* 87.; *Smyth* v. *Foley*, 3 *Y. & Col.* 87.

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Feb. 2.
April 10.

Bequest of copyhold and leasehold property to the testator's widow, for life; and at her death the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his share to be divided amongst the surviving children: Held, that the child of a son who died in the testator's life, was entitled to such share as her parent, if he had survived the widow, would have been entitled to.

THE question to be determined in this case, depended on the construction of the will of *Arnoldus Le Jeune*.

The testator, at the date of his will, had four sons, *Charles*, *Anthony*, *Arnold*, and *Joseph*, and one daughter, *Mary*.

By his will, which was dated the 10th day of *November* 1813, he gave all his copyhold and leasehold estates,

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estates, and all other his estates, of what nature or kind soever, to his wife for her life; and he proceeded to express himself in the following words: — "And at my said wife's decease, I order and direct, that the whole of my property be sold, if necessary, and divided into five equal parts or shares; one of which shares, I direct to be paid to each of my four sons, that shall be living at the time of her decease; and in case of either of their deaths, then the share of such so dying, to be paid to his issue, as they shall attain the age of twenty-one years; and in case either of my sons shall die without issue, then his share to be divided among the survivors of my five children, hereinafter named; to be paid to him in manner before mentioned." He then gave the other fifth part of his estate, together with the proportions of either of his sons shares who should happen to die without issue, for the benefit of his daughter *Mary* and her children.

The son *Charles* died in the year 1814, leaving a daughter, *Mary Anne*, his only issue surviving him.

The testator died in *October* 1820, leaving his wife and the four children, *Anthony*, *Arnold*, *Joseph*, and *Mary*, and his grandaughter *Mary Anne*, the only issue of the deceased son *Charles*, surviving him.

The son *Arnold* died without issue in *January* 1833; and the testator's widow, the tenant for life of his property, died in *November* 1836.

The question was, whether *Mary Anne*, the child of the son *Charles*, who died in the testator's lifetime, took such share of the testator's estates, as *Charles* would have been entitled to, if he had been living at the death of the widow.

Mr.

Mr. *Pemberton* and Mr. *Purvis*, for the Plaintiffs.

Mr. *Lynch*, Mr. *Atkinson*, Mr. *Bird*, Mr. *Randall*, and Mr. *Lovat*, for the Defendants.

The MASTER *of the* ROLLS (after stating the above facts.)

If *Charles* had survived the testator, and then died in the lifetime of the widow, *Mary Anne* would have been entitled to stand in his place, as substituted legatee.

Are the words, "in case of either of their deaths," necessarily referable, to the time, between the deaths of the testator and of the tenant for life; or may they not be referred, to any time prior to the death of the tenant for life, even though the time should be in the lifetime of the testator himself?

Nothing is given to any son, who should not be living at the time of the death of the tenant for life; no interest was to vest in a son, on the death of the testator; and I think, that the death of the son, in the lifetime of the testator, did not defeat the gift to the issue of the son, in the event of the son's dying in the lifetime of the tenant for life; and consequently, that *Mary Anne*, as the only issue of *Charles*, is entitled to such share of the testator's estate, as *Charles* would have been entitled to, if he had been living at the time of the widow's death.

Note. See *Tytherleigh* v. *Harbin*, 6 *Sim.* 329.; *Smith* v. *Smith*, 8 *Sim.* 353.; *Giles* v. *Giles*, *ib.* 360.; *Rust* v. *Baker*, *ib.* 446.

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B. and *C.* were jointly bound as sureties for *A.*; *D.*, the wife of *A.*, charged her separate estate to indemnify *B.* from all losses, &c. The whole loss was borne by *B.* alone, who afterwards, without the concurrence of *D.*, released *C.* his co-surety: Held, that *D.*'s separate estate was thereby released from the moiety of the losses.

A deed, after reciting that *A.* had agreed to charge certain property with all sums which *B.* should pay as surety for a third party, together with interest on all such payments, and all such costs, &c. as he might sustain, &c., proceeded to charge the property with the payment of all such sums, costs, &c., *with interest as aforesaid:* Held, that interest was not payable on the costs, &c.

By the same deed *A.* agreed that *B.* should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by *B.*: Held, that he was entitled to interest thereon at 4 per cent.

A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; and that, notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction.

THE Plaintiff, *Samuel Hodgson*, by this suit, sought to charge the separate estate of *Susannah*, the wife of *William Hodgson*, by virtue of a deed executed by her under the following circumstances.

In the year 1824, the Defendant, *William Hodgson*, was appointed committee of the estate of *Ann Barrow*, a lunatic; and on the 8th day of *June* in the same year, he, together with *Henry Hodgson*, and the Plaintiff, *Samuel Hodgson*, as his sureties, entered into a recognisance in the sum of 900*l.*, defeasible on *William Hodgson* duly accounting for the lunatic's estate, which should come to his hands; he did not duly account, and in *April* 1827 being in embarrassed circumstances, a commission of bankrupt issued against him, and very soon afterwards, orders were made in the matter of the lunacy, requiring him to pay considerable sums of money into Court; he was desirous of superseding the commission of bankrupt, and to relieve himself from the pressure of the orders.

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No order had then been made against the sureties; but, from some transactions subsisting between *William* and *Henry Hodgson*, it seemed that *William* thought that he had a right to call upon *Henry* to pay. No such transactions were subsisting between *William* and the Plaintiff *Samuel*, and it was thought desirable, to induce *Samuel* to pay voluntarily, his share at least of the debt in the lunacy.

The Defendant *Susannah*, the wife of *William*, was entitled for her life, for her separate use, to the residuary estate of *Rice Pritchett*, of whose will the Defendant *Daniel Ledsam* and Mr. *Crumpton* were executors.

On the 20th of *June* 1827, *Susannah Hodgson* executed a deed poll, whereby it was recited, amongst other things, that two orders had been made for payment, by *William Hodgson*, of the sums of 160*l.* 16*s.* and 537*l.* 9*s.* 1*d.* respectively, which sums, *William Hodgson*, by reason of his bankruptcy, was unable to pay; and that the Plaintiff, *Samuel Hodgson*, was desirous to pay his moiety of those sums, and of what further balance should be found due to the estate of the lunatic, *Henry Hodgson* being to discharge the other moiety thereof; and that *Susannah* had agreed to charge her life interest in *Pritchett*'s estate, by way of security to *Samuel Hodgson*, and to give the executors authority to pay him, out of the rents of the said estate, all such sum and sums of money as he might be liable to pay, and should pay, as well for his moiety or share of the said several sums of 160*l.* 16*s.* and 537*l.* 9*s.* 1*d.*, so due and owing by the said *William Hodgson*, as such committee of the estate of the said lunatic, as of all such further sum and sums of money, as should be found due and owing to the estate of the said lunatic, on passing the further ac-

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counts of the said *William Hodgson*, together with interest on all such payments by him, the said *Samuel Hodgson:* and all such costs, charges, and expenses, as he might sustain, pay, incur, or be put unto, in consequence of his being liable, as a surety for the said *William Hodgson*. *Susannah* also agreed, that an insurance on her life, for 400*l.*, should be effected, and that the annual premiums for keeping the same on foot, should be paid out of her life estate; and she agreed, by means of her life interest, and the rents and annual produce of the residue of the estate, and of the insurance, to indemnify and save harmless *Samuel Hodgson*, of and from any further or other payment, which he might be compelled to pay, in any respect whatever, in regard to the other moiety of the sums due, or to be found due, to the lunatic's estate. The deed poll then witnessed, that *Susannah* charged all her life interest, to pay and make good, all and every such sum and sums of money, costs, charges, and expenses whatsoever, as he, the said *Samuel Hodgson*, should be obliged to pay, expend, incur, or be made liable to, as such surety as aforesaid, with interest as aforesaid, on all such payments; and to save harmless and fully indemnify him, the said *Samuel Hodgson*, his executors and administrators, as well from his own part, or share, or contribution, of or towards the said several payments and liabilities, but also, for or in respect of the other moiety, in case he should be compelled to pay the same, or any part thereof; and she directed the executors, to pay out of the rents, yearly, until the money intended to be secured should be repaid, the sum of 50*l.* a year, and such further sum, as should be required, for effecting or keeping up the policy of insurance; and there was a proviso that *Samuel* should prove the amount of what he should have to pay, as surety, as a debt against the estate of *William*, and apply the dividend in reduction of the security: and

and that when all was paid, the policy should be assigned, to a trustee for *Susannah*.

The Plaintiff, in pursuance of the arrangement, with a view to which this deed had been executed, and in discharge of his recognizance, paid several sums of money, in respect of his being surety for *William Hodgson*. *Henry Hodgson* did not appear to have paid anything, so that *Samuel's* payments were not confined to his own contributory share, but were made in respect of the whole debt due from *William;* and as *William* paid nothing, and the commission of bankrupt against him, was, according to the intention before the execution of the deed, superseded, *Samuel* received nothing in respect of his payments.

Some negotiations, for a varied security, afterwards took place, but did not come to any satisfactory conclusion. *Samuel Hodgson*, having made his payments, was entitled to the benefit of his security from *Susannah*, and was also entitled to contribution from *Henry;* and, in this state of things, being co-surety with *Henry*, and having a right of contribution against *Henry*, and a right of indemnity against *Susannah*, he executed an indenture, dated the 14th of *August* 1829, by which, in consideration of the full payment of a debt of 53*l.* 8*s.* 2*d.*, due to himself from *Henry*, and of 8*l.*, for costs thereon, and for divers other good considerations (not specified) him thereunto moving, he covenanted and agreed, that he would not prosecute *Henry*, either for the debt of 53*l.* 8*s.* 2*d.*, or for, or on account of, the 160*l.* 16*s.*, and the other sums ordered, or to be ordered, to be paid in the lunacy, or for any share or contribution of the same; and that if any suit or proceeding, were commenced against *Henry* by *Samuel*, or any other person, on account of any such payment or contribution, then

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every debt owing to *Samuel*, touching any of the matters therein mentioned or referred to, should be thereby acquitted and discharged; and the indenture was to operate as a release thereof: and the Plaintiff *Samuel*, thereby indemnified *Henry*, against the payment of any sums which might be ordered to be paid in the lunacy, on account of the balances of *William*.

In *July* 1827, the Plaintiff gave Mr. *Ledsam*, the Trustee, notice of his deed, and required him not to pay over the whole 50*l.* to Mrs. *Hodgson*, but to retain the 50*l.* a year and the amount of premiums: this, it appeared, he had neglected to do.

This bill was filed by *Samuel Hodgson*, to obtain payment, out of the separate estate of *Susannah Hodgson*, of the monies which he had paid in respect of the defalcation of her husband in the lunacy, and the sums paid for the policy of assurance, and certain costs, &c.

Mr. *Pemberton* and Mr. *James Russell*, for the Plaintiff.

Mr. *Kindersley* and Mr. *Simpson*, for Mrs. *Hodgson*, contended, first, that the deed was not valid, being made without consideration; and, secondly, that, if valid, it was only effective to the extent of one moiety of the losses sustained by *Samuel*; for that by the release of *Henry*, who was a surety, the separate estate of Mrs. *Hodgson* was released.

Mr. *G. Richards*, for the trustee, Mr. *Ledsam*, contended, that he was not liable to repay, to the Plaintiff, the monies already handed over to Mrs. *Hodgson*; on the ground, that the Plaintiff had not taken proper measures to prevent it, by applying for an injunction; besides which, the trustee could not be expected to adjudicate between the parties.

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The MASTER *of the* ROLLS, after stating the circumstances of the case, proceeded: —

It is alleged, on the behalf of the Defendants, that the deed was not valid, because executed without consideration and obtained by surprise; *Samuel*, it is said, was already bound to pay the debt of *William*, and consequently, *William* was placed in no better situation by this deed, but on consideration of the evidence, and having regard to the situation of the parties, —the importance of *William* being immediately free from the pressure of the orders,—and the circumstances deposed to by Mr. *Gem*, I am of opinion that the deed is valid.

As to the effect of the deed, it appears to me, to have been intended, that *Samuel* and *Henry* should pay the debt in equal moieties, but it was at the same time contemplated, that *Samuel* might be compelled to pay the moiety, which *Henry* was intended to pay; and the security was intended to cover, not only the share which *Samuel* intended to pay for himself, but also, the share which he might be compelled to pay for *Henry;* but I think, that the security was to be made effectual, by applying, out of the income of *Susannah*, 50*l.* a year, towards the debts and the sums requisite to keep up an insurance on her life, of 400*l.*, and such further sums as *Samuel* should pay; and that it was not intended, that the security should be made effectual, by the application of the whole of *Susannah's* income.

[His Lordship here stated the subsequent transactions between the Plaintiff *Samuel*, and *Henry Hodgson*, and the release.]

The circumstances, under which this deed was executed, do not very clearly appear; but it is obvious, that,

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between *Henry* and the Defendant *William*, there were transactions, in respect of which, it was considered that *William*, though the principal debtor in the lunacy, had a right to call upon *Henry*, who, in that respect, was only his surety, to pay a portion of that debt; and this appears to have been known to *Samuel*.

Now, supposing *Samuel* to have had, what I think he had, under the deed of 1827, a claim for all he should be compelled to pay in the lunacy for *William*, it is clear that he had a right to contribution from *Henry*; and clear also, that *Susannah*, being under the obligation to make good his payments, had a right to the benefit of his remedy against *Henry*. By his release of *Henry* he deprived her of that benefit.

The question is not, how far the claim of *Samuel* against *William*, the principal debtor, would have been effected by the release of *Henry*, the co-surety. *Susannah* was herself only a surety, and as surety, she plainly relied on the contribution of *Henry;* as to her, I think that *Samuel* must be considered as a principal debtor, and that *Henry* was jointly and severally liable with him; they were bound by their respective liabilities before she was in any way affected by them; and it appears to me, that *Samuel* could not, without her consent, release *Henry*, and at the same time, continue his claim against her, for that which he had, previously, a right to recover from him. I do not particularly advert to the alleged insolvency of *Henry*, because the evidence of it, that of *Henry* himself, is, under the circumstances, scarcely to be relied upon, because, in the very act of giving the release, *Samuel* obtained full payment of his debt; and also, because, in a case such as this, I think that *Susannah* ought to have had an opportunity of judging for herself, whether she would, or not, (having regard

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regard to the circumstances of *Henry*) prosecute her claim to contribution. I think that *Samuel* was not entitled to relieve *Henry*, with a view to make *Susannah* pay.

I think, therefore, that the Plaintiff, by executing the deed of *August* 1829, exonerated the Defendant *Susannah*, from so much of the claim he had against her, as arose from payments, in respect of which, he had a right to contribution from *Henry*. And that the deed of *June* 1827, is to stand as a security for the payment of one moiety only of the payments, which *Samuel* has paid for the balances due from *William*, and for the payment of the costs, properly incurred by him, in the matter of the lunacy.

The Master is to take an account of such payment and costs, and also an account of what is due for the 50*l.* a year, the amount of what shall be so due is to be paid by the Defendants, in reduction of the Plaintiff's demand, and the sum of 50*l.* a year is to be annually paid by the Defendant *Ledsam*, in further reduction thereof.

The Plaintiff is entitled to have a policy of insurance, on the life of Mrs. *Hodgson*, kept on foot, at the expense of her estate, for so much as shall remain due, after applying what is due for the 50*l.* a year.

Declare that the Plaintiff *Samuel Hodgson*, by his execution of the deed bearing date the 14th day of *August* 1829, exonerated the separate estate of the Defendant *Susannah*, the wife of the Defendant *William Hodgson*, comprised in the deed of the 20th *June* 1827, from so much of the claim which he had against such separate estate, under the last mentioned deed, as arose from pay-

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ments, in respect of which, the said Plaintiff had a right to contribution from *Henry Hodgson*, by reason of the joint and several liability of the said Plaintiff *Samuel Hodgson*, and the said *Henry Hodgson*, under the recognizance in the pleadings mentioned.

Costs out of the separate estate.

The liability of *Ledsam* having been referred to, the Master of the Rolls said, my opinion is, that, after notice, *Ledsam* had no right to pay this money over to Mrs. *Hodgson;* if there existed any doubt, he ought to have secured it; and not having done so, I think he is answerable for it; he took on himself to act as if the deed was altogether invalid, and he did so at his own peril.

Nov. 25. The cause was again put in the paper to be mentioned on the minutes of the decree, when

Mr. *Pemberton* and Mr. *James Russell*, contended, that the Plaintiff was entitled to interest on the amount of premiums paid by him, and also on the costs and expenses incurred by him, to be calculated from the time of their being respectively paid. As to interest on the costs, they relied on the operative part of the deed, by which *Susannah* charged her separate estate with the payment of all sums, costs, charges, and expenses whatsoever incurred by *Samuel Hodgson*, with interest as aforesaid. With respect to the premiums, they contended, that the policy having been kept up by the Plaintiff, in consequence of the default of *Susannah* and her trustee, in paying the premium, the Plaintiff was entitled to interest thereon, in the same way as fines paid for the renewal of leaseholds always carried interest; and besides this, that she could not claim the benefit of the policy,

policy, without repaying what had been advanced in respect thereof, with interest.

Mr. *Kindersley* and Mr. *Simpson*, *contrà*. The operative part of the deed gives "interest as aforesaid," and referring, therefore, to the agreement, as recited in the former part of the deed, it appears that interest was to be charged on those sums only, which were paid in respect of the lunacy.

The MASTER *of the* ROLLS, after referring to the terms of the deed, decided, that the Plaintiff was entitled to interest at 4 per cent. on the premiums, but not on the costs, &c.

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March 2.
April 6.

The lien of solicitors cannot interfere with the equities between the parties.

The execution of a writ of attachment for costs, does not deprive the party issuing it, of any lien, or right of set-off he may possess for the payment of such costs.

THIS case came before the Court, upon a petition presented by *William Baker Cox*, the solicitor of the Defendant *Watson*, praying, that he might be declared to have a security and lien on the copyhold estate, in the cause mentioned, by virtue of a deed dated the 22d of *April* 1834, and of the deposit, with him, of certain deeds and documents.

The bill was filed in *May* 1831, for the purpose of setting aside certain deeds, purporting to create a charge on the copyholds in question, in favour of the Defendant; on

A sum was found due from the Plaintiff to the Defendant; and, on the other hand, the Defendant was ordered to pay the costs of suit: — Held, that the lien of the Defendant's solicitor, for his costs, extended only to the ultimate balance due from the Plaintiff, after deducting the costs payable to him by the Defendant.

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on the ground of their having been improperly obtained by the Defendant from the Plaintiff; and for an account of the rents and profits thereof. Shortly before the cause came on to be heard, the Defendant executed a deed, dated the 22d of *April* 1834, whereby, after reciting that he was indebted to the petitioner for costs and disbursements, in the sum of 450*l.*, he covenanted to surrender the same copyhold premises, to the use of the petitioner, as a security for payment of the 450*l.*

Three days afterwards, viz. on the 25th of *April* 1834, the cause was heard; and it was declared, that the deeds were obtained by fraud on the part of the Defendant, and were to be set aside, or stand only as a security, for what, if any thing, might appear to be due from the Plaintiff to the Defendant. An account was then directed to be taken, of the dealings and transactions between the Plaintiff and the Defendant; and it was declared, that on payment of what should be found due to the Defendant, he should reconvey the property; and it was ordered, that the Plaintiff's costs of the suit up to the hearing, should be taxed, and should be paid by the Defendant; and the Court reserved subsequent costs.

The Plaintiff's costs of suit were taxed at the sum of 324*l.* 8*s.* 2*d.*; but before the accounts were taken, the Defendant was imprisoned in the King's Bench, for debt, at the suit of another person; and thereupon, the Plaintiff in this cause, lodged an attachment for the costs, with the Marshal of the prison: and became entitled to detain the Defendant for the amount of the taxed costs; the Defendant afterwards took the benefit of the Insolvent Debtor's Act, and having inserted the costs due to the Plaintiff, in his schedule, he was discharged from prison.

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A supplemental bill was filed against the provisional assignee; and the Master, by his report, dated the 9th day of *December* 1836, found on the account, that the Defendant had advanced, to or for the use of the Plaintiff, various sums, amounting together to 2964*l.* 1*s.* 9½*d.*; and he thereby charged the Defendant with the sum of 2509*l.* 19*s.* 8*d.* The result was, that a balance of 454*l.* 2*s.* 9½*d.* was found in favour of the Defendant; and the decree, on further directions, dated the 26th of *July* 1837, declared that the amount of costs, viz. 324*l.* 8*s.* 2*d.*, should be added to the sum with which the Defendant was charged; and it was referred back to the Master to take an account of the rents and profits, which the Defendant had received, of the estate in question.

By his further report, dated the 23d of *January* 1838, the Master found, that the Plaintiff had waived an account of profits, but that the Defendant had received 299*l.* for rents: that the rents added to the costs before taxed, amounted to 623*l.* 8*s.* 2*d.*, and deducting from that sum, the 454*l.* 2*s.* 9½*d.*, the former balance due to the Defendant, there remained due from him 169*l.* 5*s.* 4½*d.*

Upon this report, a further decree was made on the 13th of *February* last; and thereby, it was ordered, that the Master's report, dated the 23d of *January* 1838, should be confirmed; and it was referred back to the Master, to tax the Plaintiffs their subsequent costs; and it was ordered, that such costs, when taxed, should be added to the amount, already found, by the report of the 23d of *January* 1838, to be due to the Plaintiff *William Bawtree;* and it was ordered, that the Defendant *Samuel Sturgis*, the provisional assignee of the Defendant *Watson*, should join in surrendering the copyhold estate, in the pleadings mentioned, subject to the mortgages in the

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the pleadings mentioned; and it was ordered, that the Master should tax the costs of Defendant *Sturgis*, and that such costs, when taxed, should be paid by the Plaintiff *William Bawtree*, and be added to the amount of his debt; and it was ordered, that the receiver of the said copyhold estates should pass his accounts, and pay the balance, if any, to the Plaintiff, in part discharge of his debt, and that, upon payment thereof, his recognizances should be discharged.

It appeared that in the progress of the suit, the Defendant had also delivered to the petitioner, his solicitor, various deeds and documents, relating to the copyhold estate in question, for securing the 420*l.* The petitioner, by his petition, prayed, that he might be declared to have a lien on the copyhold estate, by virtue of the deed of *April* 1834, and the deposit of the other deeds; and that, if necessary, an account might be taken, of what was due to the petitioner; and that the provisional assignee and the Defendant might be restrained from surrendering the estate to the Plaintiff, until the petitioner had been paid.

Mr. *Pemberton* and Mr. *W. C. L. Keene*, in support of the petition.

Argued, first, that the petitioner had a lien on the copyhold estate, by virtue of the deed of the 22d *April* 1834; and that such lien extended to the amount of the balance of 454*l.* 2*s.* 9½*d.*, found in favour of the Defendant, by the report of the 9th day of *December* 1836. It was further contended for the petitioner, that at least, he had a lien upon the balance ultimately found due. That if from the sum of 454*l.* 2*s.* 9½*d.*, the balance found due to the Defendant, in the first report, the sum of 299*l.*, charged against him for rent

on

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on the second report, were deducted, there would remain a sum of 155*l.* 2*s.* 9½*d.* due to the Defendant. That the Plaintiff would not, in any case, be entitled, as against a lien of the Defendant's solicitor, to apply this sum towards satisfaction of his costs; and that if in ordinary cases, he might be so entitled, he could not be so in this case, because, by lodging the attachment, he elected to adopt his legal remedy for the recovery of his costs, and, thereby, lost his equitable right of set off.

Doe dem. Swinton v. *Sinclair* (*a*), *Jones* v. *Turnbull* (*b*), *Howell* v. *Harding* (*c*), and *Harmer* v. *Harris* (*d*), were relied on.

Mr. *Hayter*, *contrà*, contended that the solicitor's lien, extended only, to the balance ultimately found due, and could not be permitted to interfere with the Plaintiff's right of set-off for the costs payable to him by the Defendant. That the account of *December* 1836 was incomplete; and that no such balance as 454*l.* ever, in reality, existed: as to the deed of covenant, and the deposit of the deeds, he contended that they were ineffectual under the doctrine of *lis pendens*.

Mr. *Reynolds*, for the assignee of *Watson*.

The MASTER *of the* ROLLS.

The principal question is, whether the lien of a solicitor is to enter into conflict with the equities between the parties; or whether in a case, where costs have been awarded to the Plaintiff, and a debt found due from him, he can, on further directions, be permitted to set off the costs, without regard to the lien of the solicitor.

(*a*) 5 *Dowl. Pr. Ca.* 26.
(*b*) *Ib.* 591.
(*c*) 8 *Taunt.* 362.
(*d*) 1 *Russ.* 155.

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solicitor. Another point is, whether the deed of covenant of *April* 1834, can affect the rights of the parties; and I am of opinion, that the deed obtained by the solicitor from his client, *pendente lite*, can in no way affect the Plaintiff's rights against the Defendant; and that the solicitor's lien, upon a balance due to his client, cannot extend beyond the amount of the true balance ultimately ascertained: although, in one stage of the cause, a larger balance, than that which was ultimately found to be just, appeared on the Master's report.

There is also another question, arising out of the attachment, whether the party, having thought fit to follow a personal remedy, is entitled to resort to his lien. I shall give these points my further consideration.

April 6.

The MASTER *of the* ROLLS (after stating the case and the points argued,) said, I before stated my opinion, that the deed obtained by the solicitor from his client, *pendente lite*, could in no way affect the Plaintiff's rights against the Defendant; and that the solicitor's lien, upon a balance due to his client, could not extend beyond the amount of the true balance, as ultimately ascertained: although, in one stage of the cause, a larger balance, than that which was ultimately found to be just, appeared on the Master's report. Upon looking into the cases, it does not appear to me, that this Court allows the solicitor's lien to interfere with the equities between the parties. The Plaintiff has been declared to be entitled to his costs, and as against the Defendant *Watson*, or his assignee, or his solicitor, the Plaintiff has a right, in this Court, to apply any balance due to the Defendant, towards satisfaction of those costs, if the right be not prejudiced, by his lodging the attachment; and I do not think, that this makes any difference. I

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am of opinion, that the execution of a writ of attachment for costs does not deprive the party issuing it of any lien, or right of set-off, for payment of the same costs, which he may possess.

If the Plaintiff had received any thing upon the attachment, or on account of the costs, there would be ground for an inquiry on the subject; but there is no allegation even, to that effect. And I am of opinion that the petition must be

Dismissed with costs.

See *Ex parte Rhodes*, 15 *Ves.* 541.; *Shine* v. *Gough*, 2 *Ball. & B.* 34.; and *Ex parte Bryant*, 1 *Mad.* 49.

MONTEITH *v.* NICHOLSON.

May 9. 27.

A testator bequeathed his personal estate to his brothers and sisters absolutely; and declared, that if any of them should die in his lifetime, or afterwards, without leaving lawful issue him surviving, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue him surviving, his share should be divided amongst his issue; and he declared, that none of the legatees should be entitled to any bequest, until they attained twenty-one. Held, that on attaining twenty-one, the brothers and sisters took absolute interests, and that the limitation over, was to take effect only in the event of the death of a legatee under twenty-one, in the lifetime of the testator, or afterwards.

WILLIAM COWEND NICHOLSON, the testator, by his will, dated in *July* 1834, bequeathed as follows: — "I give and bequeath unto and equally amongst all and every my brothers and sisters, living at my decease, all that the principal sum of 500*l.*, standing in the books of the Governor and Company of the Bank of *England*, in my name; also all the interest due and to grow due upon the same, to hold the same to them, my said brothers and sisters, their executors, administrators, and assigns, in equal shares and proportions,

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portions, as tenants in common, and not as joint tenants. I also give and bequeath unto all of them, my said brothers and sisters, all that my part, share, or interest in all the household goods and furniture, belonging to my father; also all and every the rest and remainder of all my personal estate absolutely; and I declare it to be my will and meaning, that if any of my said brothers and sisters die in my lifetime, or afterwards, without leaving lawful issue him, her, or them surviving, the share or shares of him, her, or them so dying shall go to, and be equally divided amongst the survivor or survivors of them; and if any of them, my said brothers and sisters, die in my lifetime or afterwards, leaving issue him, her, or them surviving, the share or shares of him, her, or them so dying shall go to, and be equally divided amongst such issue, share and share alike, as tenants in common, such child or children taking their parents' share; and, moreover, I declare it to be my will, that none of the legatees, under this my will, shall be entitled to any bequest until they severally attain the age of twenty-one years."

The question in this cause was, whether, upon the true construction of the will of the testator, *William Cowend Nicholson*, his brothers and sisters took absolute estates in the legacies given to them, on their attaining their ages of twenty-one years; or whether, they, at that period, took estates for life only, in all or any of those legacies.

Mr. *Pemberton* and Mr. *Wray*, for the Plaintiffs, who were the brothers and sisters of the testator claimed an absolute interest in the fund.

Mr. *Kindersley* and Mr. *Bacon*, for the executor.

Mr.

Mr. *Berrey*, for *William M. Monteith*, the infant child of the Plaintiff, *James Monteith*, insisted, that the brothers and sisters of the testator, *William Cowend Nicholson*, took a life interest only under his will, in his personal estate.

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The MASTER *of the* ROLLS.

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The words of bequest, in the first part of the will, give to the legatees absolute vested interests in the 500*l.* stock, in the testator's share of his deceased father's furniture, and in his own residuary estate; the next clause in the will contains a limitation over (in the event of the legatee dying in the testator's lifetime or afterwards), to the surviving legatee, if the deceased legatee had died without issue; and to the issue of the deceased legatee, if the deceased legatee had died leaving issue. The testator then declares, that none of the legatees shall be intitled to any bequest, until they severally attain the age of twenty-one years; and taking all the clauses together, I think that the effect is, to give an absolute vested interest to each legatee, on attaining the age of twenty-one years; and that the limitation over is to take effect, only in the event of the death of the legatee, dying under the age of twenty-one years, in the lifetime of the testator, or afterwards.

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June 1. 3.
Nov. 5.

BETWEEN

Sir JAMES WEBSTER WEDDERBURN, Bart., ARCHIBALD MURRAY DOUGLAS, Esq., GEORGE HAWKINS, Esq., and MARY WEDDERBURN his Wife, and CHARLES WEDDERBURN WEBSTER - - Plaintiffs;

AND

JAMES WEDDERBURN, since deceased, ANDREW COLVILE, ALEXANDER SETON, ROBERT DOUGLAS, and ELIZABETH his Wife, and JOHN WEDDERBURN, and Sir DAVID WEDDERBURN - - Defendants.

Account of deceased partner's estate directed after a lapse of thirty years and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested; the surviving partners being the executors of the deceased partner and guardians of, the *cestuis que trust*, and the settlements being partial only, and founded on insufficient knowledge, by the *cestuis que trust*, of the partnership affairs and accounts.

THE circumstances of this case are so fully detailed in the judgment of the Master of the Rolls, that it is considered unnecessary, here, to state them.

A., *B.*, and *C.*, in 1796, became partners, as merchants, under articles for seven years, and it was provided, that if either partner died in the mean time, the partnership should be determined, as to his share, from the 1st of *May* following his death; and that thereupon an account should be taken, and, after payment of debts, "payment, appropriation and delivery" should be made between the surviving partners and the executors of the deceased partner, of the residue of the monies, goods, &c., of the partnership. In 1801 *B.* died, and appointed his wife and surviving partners, *A.* and *C.*, his executors and guardians of his infant children, who were his residuary legatees. *A.* and *C.*, only, proved the will, and having caused a valuation and account of the partnership's assets to be made, a balance sheet was settled, up to the 1st of *May* 1801, shewing what amount was considered due to the testator's estate (which included outstanding credits to a large amount), and his estate was credited accordingly in the partnership books, and the partnership continued by the surviving partners, but no severance of the assets was made.

In *May* 1809, the eldest son came of age, and an account was stated by the executors, of the testator's residuary personal estate, but which assumed, as its basis, the valuation and account made on the testator's death: another account was stated of the debts and credits remaining unpaid and uncollected, shewing what was

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Mr. *Pemberton*, Mr. *Koe* and Mr. *Williamson*, for the Plaintiffs.

Mr. *Tinney*, Mr. *Kindersley* and Mr. *Colvile*, for the Defendants.

The following authorities were relied on: — *Cook* v. *Collingridge* (*a*), *Crawshay* v. *Collins* (*b*), *Walker* v. *Symonds* (*c*), *Gregory* v. *Gregory* (*d*), *Champion* v. *Rigby* (*e*), *Chalmers* v. *Bradley* (*g*), *Downes* v. *Gazebrooke* (*h*), *Ex parte Lacey* (*i*), *Cockerell* v. *Cholmondeley*. (*k*)

The MASTER *of the* ROLLS.

This is a bill filed by Sir *James Wedderburn Webster*, and other persons, the children, or representing the children, of *David Webster* deceased, against *James Wedderburn*,

(*a*) 1 *Jac.* 607.
(*b*) 15 *Ves.* 218.
(*c*) 3 *Swan.* 64—69.
(*d*) *Cooper*, 201. *S. C. Jacob*, 631.
(*e*) 1 *Russ. & M.* 539.
(*g*) 1 *Jac. & W.* 51.
(*h*) 3 *Mer.* 200.
(*i*) 6 *Ves.* 628.
(*k*) 1 *R. & M.* 425.

was then divisible: and another of the monies expended for the eldest son's maintenance. A deed dated *September* 1809, between *A.* and the eldest son, was executed, on which these accounts were endorsed, and *A.* covenanted for the payment, by instalments, of the share due to the eldest son, so far as the same had been realised; and the eldest son declared he was "content and satisfied with the disclosures thus far made and accounts thus far given," &c.; and it was provided he should not be prevented from claiming any further share "not as yet received, or fallen in, or accounted for."

In 1810, 1815, 1821, 1826, and 1830, changes took place in the partnership firm. There were three younger children, who attained twenty-one respectively, in 1812, 1813, and 1820, when similar accounts, founded on the same basis, were stated to each of them by the executors; and a similar deed of settlement executed by the two former, and a release by the latter, and further divisions of the testator's assets made accordingly. In 1816 the only other child died an infant, and then also a division of assets was made; and, in 1822, a deed of release was executed by the trustees of the settlement of one of the daughters, in respect of a balance not included in the deed executed by her. The bill was filed in 1831, by the several children and their representatives:

Held that, *A.* and *C.* being executors and guardians as well as surviving partners, and the release being partial only, and founded on insufficient knowledge by the *cestuis que trust* of the partnership affairs and accounts, the Plaintiffs were not precluded, by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, and claiming a share in the profits arising from the testator's assets having been used in the business of the successive partnerships.

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Wedderburn, since deceased, *Andrew Colvile* and other persons, who are, or represent the surviving partners and the executor of *David Webster*, or persons interested in the business in which he was concerned, and which was carried on after his death, and also against his widow, and her second husband; and the bill prays a declaration, that the children of *David Webster*, and those who represent them, are, under the circumstances, entitled to participate in the gains and profits made by carrying on the partnership business since his death: and that an account thereof may be taken, and that the Plaintiff's share may be paid by the Defendants, Sir *David Wedderburn*, *James Wedderburn*, *Andrew Colvile* and *Alexander Seton*. The bill also prays a general account of the estate of *David Webster*, and of the application thereof, and of what is due to the Plaintiffs, under his will.

It appears, that in 1796, *John Wedderburn* and the testator, *David Webster*, who had for some time before carried on business as merchants in partnership together, agreed to take the Defendant, Sir *David Wedderburn*, into partnership with them; and it was agreed, that the three should carry on business together, for seven years, if they should all so long live. The terms of the partnership were the subject of a deed, dated the 21st of *May* 1796, and made between *John Wedderburn* of the first part, the testator, *David Webster*, of the second part, and the Defendant, Sir *David Wedderburn*, of the third part; and thereby, it was declared, that during the continuance of the partnership, *John Wedderburn* and *David Webster* should be equally entitled to five sixth shares of the business; and *David Wedderburn* to one sixth share thereof; but if either *John Wedderburn*, or *David Webster* should die during the seven years, then, from the 1st of *May* ensuing such

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such death, the survivor of them should become entitled to two thirds of the business, and *David Wedderburn* to the remaining one third. It was provided, that each of the partners, should at all times during the partnership, and at the determination thereof, enjoy a several share and interest in the business, and the capital thereof, and the profits to be produced thereby, and in the goods and debts thereof, according to their respective interests in the trade; that an account should be yearly made out and stated; and that if any of the partners should die during the partnership, the executors of the partners dying should stand in his place, and be considered a partner, until the first day of *May* after the death of the deceased partner, when the partnership, as to such deceased partner, was to determine; but the executors of the deceased partner were not to act in the business, and the surviving partners were not to enter into new engagements, so as to prejudice or affect the executors of the deceased partner, or their interest in the capital. And upon the 1st day of *May*, next after the death of the deceased partner or in three months afterwards, the surviving partners were to make out a full and perfect account of the partnership business, property and liabilities, and deliver a copy thereof to the executors of the deceased partner; and the executors of the deceased partner, were to meet the surviving partners, and to examine the books; and finally adjust and settle the account, which was then to be signed; and as soon as might be, after the account was settled, payment was to be made of all debts due from the partnership; and after payment thereof, then true payment, partition and delivery was to be made, by and between the surviving partners, and the executors of the deceased partner, at their then house, or place of trade, according and in proportion to their several and respective shares and interests, of and in the trade or business, of all the clear

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residue and surplus of the monies, securities, goods, wares, merchandises, property and effects whatsoever, which should then be due and belonging to the said joint trade, or business, or to the surviving partners and the executors of the deceased partners, in respect thereof, and also all outstanding debts, and sums of money, due and owing, or belonging to the surviving partners and the executors of the deceased partner, on account of the joint trade; and which, after all the debts from the partnership were fully paid, were to be shared and divided, between the surviving partners and the executors of the deceased partner, in proportion and according to their several and respective shares and interests in the said joint trade; and thereupon assignments and releases were to be made and given. (*a*)

Upon these terms, the partnership business commenced, and was carried on, under the firm of *Wedderburn, Webster* and Co. It appears, that the partnership property consisted, to a considerable extent, of ships and shares of ships; and of debts owing to the concern, and particularly a very large debt, owing to the firm from the estate of *James Wedderburn*, deceased, under whose will Mr.

(*a*) And the deed contained a covenant from Sir *David Wedderburn*, to purchase one fourth part of the ships belonging to *John Wedderburn* and *David Webster*, at a valuation: and a further covenant, that if Sir *David*, by the death of *John Wedderburn* or *David Webster*, should become entitled to an increased share in the business, he would thereupon purchase an increased share in the ships and other property and effects, from the executors of *John Wedderburn* or of *David Webster*. And immediately after the ships, goods, wares, merchandises, property and effects which he was to purchase were valued and appraised, he was to give security for payment of the amount.

It did not, however, appear in what manner Sir *David Wedderburn* paid, or secured payment of that share of the partnership property which he was to purchase, nor, what were the particulars of the property, of which he was to purchase such share.

Mr. *John Wedderburn* was executor and residuary legatee.

In 1798, the partners agreed to admit the Defendant, *Andrew Colvile*, as a partner, on the terms of his being entitled to no share of the profits, during so much of the seven years, as he and *John Wedderburn* should jointly live, and being entitled to 1000*l.* a year for his services.

On the 10th *February* 1801, *David Webster* made his will, and thereby, after devising and bequeathing certain portions of his estates, he gave all the rest and residue of his monies, securities for money, stock in the public funds, parts and shares of ships and all other his personal estate and effects, charged with his debts, to his wife *Elizabeth* (now the Defendant Lady *Douglas*), and his partners, *John Wedderburn* and *David Wedderburn*; on trust, to sell all such parts thereof as did not consist of stocks, or monies, or securities; and to invest the proceeds. And he directed, that out of the dividends and interest, his wife should receive an annuity of 1200*l.*, to be reduced to 500*l.*, if she married again; and subject to the provision made for his wife, he gave the residue of his estate, for the benefit of his children, in the particular manner mentioned in his will, and upon which no question is raised. He appointed his wife, *John Wedderburn* and Sir *David Wedderburn*, joint executors of his will, and committed to them the guardianship, custody and tuition of his children, and of their several estates and fortunes, during their respective minorities.

Mr. *David Webster* died on the 21st *March* 1801. His wife, now Lady *Douglas*, and his partners, *John* and Sir *David Wedderburn*, survived him, and he left

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five children, *James*, *Anne*, *Mary*, *Charles* and *David*. The Plaintiffs, Sir *James Webster Wedderburn*, Mrs. *Mary Hawkins* and *Charles Wedderburn Webster*, are three of the children still surviving; the other two are dead, *Anne* having attained twenty-one, and married the Plaintiff, *Archibald Murray Douglas*, who represents her; and *David*, who was born after the testator's death, having died an infant, his interest, under the will, survived to his brothers and sisters.

On the death of the testator, Mr. *David Webster*, it became necessary to consider, what was to be done with his interest, in the firm of *Wedderburn*, *Webster* and Co. The partnership deed plainly provided, that notwithstanding the death of a partner, the business was to be continued on a joint account, till the first day of *May* next following, and it was then to cease, as to the interest of the deceased partner; probably, it would not have been easy, under any circumstances, to follow strictly the directions of the deed, for winding up the concern; but the accounts were directed to be settled, between the surviving partners and the executors of the deceased partner, and assignments and mutual releases were to be made and given; but these assignments and these releases were to be transactions between the surviving partners of the one part, and the executors of the deceased partner of the other part; when the deed was executed, it was not contemplated that the surviving partners, and the executors of the deceased partners, would be the same persons.

Nevertheless, Mr. *David Webster* appointed his partners, *John* and Sir *David Wedderburn*, to be two of his executors, and the guardians of his children; and they, the surviving partners, alone proved the will, and thereby became the sole legal personal representatives; and

and they thus rendered it impossible to act upon the provisions of the partnership deed, or to proceed in any mode that was satisfactory and safe, to wind up and settle the accounts and dependencies subsisting between them and their testator, and at the same time continue the trade. It would appear, however, that they did not consider that there was any difficulty, or any thing in their situation, to make it improper, or incompetent for them to adopt their own means of ascertaining the value; and to purchase, for their own use and benefit, and become the absolute owners of that share of the partnership ships, stock and effects, which belonged to the estate of their testator, *David Webster;* or from dealing, as between themselves and the estate of the testator, with the debts owing to the late partnership, in the manner they thought most convenient. They considered the partnership business, as a concern which was to devolve to them, exclusively of the testator's estate, on the 1st of *May* next following the testator's death; and they determined that it should be carried on by themselves and Mr. *Andrew Colvile* (who had previously become a partner in the manner I have mentioned), under the firm of *Wedderburn* and Co.; and the Defendants *Colvile* and *Seton* say, that for the purpose of winding up the affairs of the old firm of *Wedderburn, Webster* and Co., regular and just valuations were made, by competent persons appointed for that purpose, of the ships, shares of ships and other partnership stocks and effects; and they were taken, at such valuation, by *Wedderburn* and Co.; and the old firm was credited with the amount, in the books of the new firm, and a portion of the debts due to the old firm was transferred to the books of the new firm, and the old firm was credited therewith, in the books of the new firm; and the persons from whom they were due, were debited therewith. And certain debts, to a much larger amount, due from the

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the old firm, and carrying interest, were, with the assent of the several persons to whom they were due, transferred from the books of the old firm, to their credit, in the books of the new firm; and in lieu thereof, the old firm was debited therewith in the books of the new firm; and a balance sheet was made up to the 1st of *May* 1801, whereby it appeared, that the debts due by the old firm, and taken over by the new, so far exceeded the debts due to the old firm, and taken over by the new, and the value of the ships, and shares of ships, and other partnership stock and effects of the old firm, that there was a balance, to the amount of 98,573*l.* 18*s.* 11*d.* due to the new firm by the old firm.

As the partnership accounts then stood, it was made to appear, that the whole assets consisting of property and debts belonging and due to the old concern, amounted to - - £496,766 and a fraction, and that the whole liabilities amounted to - 410,782 and a fraction,

leaving a surplus of - 85,983 14*s.* 11*d.*;

which, when realized, was to be divided between the surviving partners, and the executors of Mr. *David Webster*, the deceased partner, in the shares following; that is to say,

To *John Wedderburn* -	£24,407	10	4
To the executors of *David Webster* -	55,101	2	1
To Sir *D. Wedderburn* -	6,475	2	6
	£85,983	14	11:

and, from this statement, it appears, that considerably more

more than three fifths of the whole surplus, belonged to the estate of *David Webster*.

The Defendants have examined witnesses, to prove that proper valuers of the ships, shares of ships and other property were appointed; that the valuations were duly and properly made; and that greater value could not have been obtained upon sale by an auction; and I do not question but that the surviving partners may have, really and *bonâ fide*, intended to settle every thing in a fair and honourable manner; but *John* and Sir *D. Wedderburn* were executors and trustees, as well as surviving partners; and in a case, in many respects similar, *Cook* v. *Collingridge* (*a*), Lord *Eldon* says, "One of the most firmly established rules is, that persons dealing as trustees and executors, must put their own interest entirely out of the question; and this is so difficult to do, in a transaction in which they are dealing with themselves, that the Court will not enquire whether it has been done, or not; but at once says, that such a transaction cannot stand" — and, therefore, under the circumstances of this case, considering the characters, filled by *John* and Sir *David Wedderburn*, in such transactions incompatible — that there was no disinterested person to superintend, or check, on the behalf of *David Webster*'s estate, either the valuation of the property, or the transfers of debts and credits, on the regulation of which, the connections and custom of a mercantile house may so much depend — I am of opinion, that the property and affairs of the firm of *Wedderburn* and Co. cannot be held to have been disposed of and settled under the provisions of the deed of 21st of *May* 1796. The principal averment in the plea, "that no part of the capital

(*a*) *Jacob*, 621.

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capital of *Wedderburn, Webster,* and Co., belonging, or due to the estate of the testator, was employed in carrying on the trade or business of the successive firms of *Wedderburn* and Co., *Wedderburn, Colvile,* and Co., and *Colvile* and Co., or any of them," fails (*a*); and the business of the new firm of *Wedderburn* and Co. having, after the 1st of *May* 1801, and notwithstanding the paper transfer in the books, been substantially carried on, with the property, capital, and connections of the old firm of *Wedderburn, Webster,* and Co., I am of opinion, that after that time, the case would have been treated as the ordinary case, in which the surviving partners think fit, after the death of the deceased partner, to deal with the property, which, having belonged to the partnership, is not, in the contemplation of this Court, exclusively theirs, for the benefit either of themselves, or any other persons, whom they may take into partnership with them. I have no doubt, that if the case had been brought under the consideration of this Court before 1809, the sale would have been held to be void; and the partners in the new firm of *Wedderburn* and Co. would have been compelled to account to the persons beneficially interested in the estate of *David Webster,* for a share of the profits made by carrying on the partnership business.

On the 31st of *May* 1809, the Plaintiff Sir *James Webster Wedderburn,* the eldest son of *David Webster,* attained

(*a*) The Defendants *Colvile* and *Seton* had put in a plea and answer; and on the argument of the plea, on the 7th *November* 1832, it was ordered that the plea should stand for an answer, with liberty for the Plaintiffs to except thereto, and the benefit thereof was thereby saved unto the said Defendants till the hearing of the cause; and the Plaintiffs, in excepting, were not to call for any account of the profits of the trade since the 1st of *May* 1801.

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attained his age of twenty-one years; and the Defendants *Colvile* and *Seton* represent, that thereupon, a general account in writing was made out, of the estates and effects of the testator, from the time of his death, up to the 1st day of *May* 1809; and that thereby it appeared, that after payment of his debts and legacies, and reserving a sum for payment of the annuities bequeathed by his will, there would then be divisible, amongst the five children of the testator, on account of his residuary personal estate, a sum of 75,068*l.* 6*s.* 10*d.*; provided that the share, due to the testator's estate, of the debt then due to *Wedderburn, Webster*, and Co., from the estate of *James Wedderburn* deceased, were paid; and that the seven twenty-third parts or shares of the Plaintiff Sir *James*, amounted to 22,846*l.* 17*s.* 10*d.*; and the four twenty-third parts or shares of each of the other children, to 13,055*l.* 7*s.* 3*d.*; that an account, in writing, was also made out from the books of *Wedderburn, Webster*, and Co., whereby it appeared what debts due to the firm, on the 1st day of *May* 1801, were then uncollected, and what debts were then due by the firm, and unpaid; and what was then due to the estate of the testator, and divisible amongst his children; and that an account was also made up, in writing, to the 1st day of *May* 1809, of all sums of money expended on account of the maintenance, education, and advancement of the Plaintiff Sir *James*, and which amounted to 11,447*l.* 11*s.* 2*d.*

Three accounts are thus professed to have been rendered; 1st, An account of the testator's estate and effects from his death to the 1st of *May* 1809; 2dly, An account of debts due to and from *Wedderburn, Webster*, and Co. on 1st *May* 1809, and remaining uncollected and unpaid; and 3dly, An account of sums paid for the maintenance, education, and advancement of Sir *James*. I must assume, that these accounts were made out under the

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the directions of *John* and Sir *David Wedderburn*, the surviving partners, and also the executors and guardians; but it is stated, that they were examined by the Plaintiff Sir *James*, and carefully examined by Mr. *Alexander Murray*, since deceased, as solicitor, acting on behalf of the Plaintiff Sir *James*, and the other children of the testator; and that after much investigation and inquiry, and particularly with reference to the large debt then outstanding, and due from the estate of *James Wedderburn*, Mr. *Alexander Murray*, and the Plaintiff Sir *James*, acting under his advice, were satisfied with and approved of the accounts.

On the subject of these accounts, the Defendants have produced evidence; Mr. *James Keil* was a confidential clerk and book-keeper of *Wedderburn* and Co., and he says, that in and previous to 1809, Mr. *Alexander Murray* acted as the solicitor of the Plaintiff Sir *James*, and, to the best of his belief, for the other children of the testator; that the several accounts, relating to the testator's estate, mentioned in the answer of *Colvile* and *Seton*, being the accounts I have mentioned, were, as he knows, investigated and examined by Mr. *Murray*, to whom he delivered the accounts; and he saw him examine the same; he then says, that the partnership books, and all other books and accounts of the firms of *Wedderburn*, *Webster*, and Co., and *Wedderburn* and Co., were open to the investigation of Mr. *Murray;* and he examined the same, for the purpose of ascertaining whether such accounts were accurate, and made out on a proper principle; and he did very narrowly examine such accounts, and investigate the principle on which the amount due to the estate of the testator, in respect of his share in the partnership funds of *Wedderburn*, *Webster*, and Co., was ascertained; and he was, after such investigation and examination, satisfied with the

the accounts; and that the same were made out on a proper principle.

Mr. *William Loxham Farrer*, another witness, without, as I understood his evidence, pledging himself to any personal knowledge of the facts, states his belief, that Mr. *Murray* acted as solicitor for Sir *James* in 1809, and continued to act for him, and the other children of the testator till 1815; and that the accounts and the partnership books were examined by him, or by some accountant employed by him, or by the Plaintiff Sir *James;* and, from Mr. *Murray* having indorsed the accounts furnished him, on the indenture of the 16th of *September* 1809 (which I shall afterwards have occasion to notice), the witness says, he has no doubt that Mr. *Murray* was satisfied with the accounts, and that they were made up on a proper principle. From the great importance, in this cause, of the accounts indorsed on the indenture of the 16th of *September* 1809, I have found it necessary to examine them minutely; they do not appear to contain any account of the estate of *David Webster*, at the time of his death, or of the assets, debts, and liabilities of the partnership, either at that time or on the 1st day of *May* next following; or of the dealings of the surviving partners and executors, with the partnership property, debts, and credits, between the time of the testator's death, and the 1st of *May* 1809; but, proceeding on the assumption that all was settled up to the 1st of *May* 1809, and that after that day, there were no concerns or transactions of the firm of *Wedderburn, Webster*, and Co., except those which related to the debts due to and owing by that partnership, it proceeds as follows: — It first states the debts due to *Wedderburn, Webster*, and Co. on the 1st of *May* 1809.

Good

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Good debts (exclusive of that due from estate of *James Wedderburn*)	£19,168	5	1
Due from the estate of *James Wedderburn* - - - -	190,472	3	0
Balance of bad and doubtful debts after certain deductions - -	17,627	8	5
	£227,267	16	6

It then states the debts due by *Wedderburn*, *Webster*, and Co. on the same day. (1st *May* 1809.)

Due to persons not members of the firm - - - -	£13,541	4	8
Stated to be due to *John* and Sir *David Wedderburn*, for balance of debts paid by them, since *David Webster*'s death, after deducting certain sums stated to be due by them - - - -	138,433	14	1
And to be due to the estate of *David Webster* - - -	75,292	17	9
	£227,267	16	6

Exclusively of the large debt due from the estate of *James Wedderburn*, the total amount of debts due to the concern (*i. e.* the good and bad together) amount to - - - £36,795 13 6

And the debts owing to strangers being - - - -	13,541	4	8
The difference is - -	£23,254	8	10

And assuming that the sums to be received on account of debts due, would equal, but not exceed the 13,541*l.* 4*s.* 8*d.*, due to strangers, this difference of 23,254*l.*

23,254*l.* 8*s.* 10*d.*, would have to be deducted from the sums previously stated to be due to the surviving partners, and the estate of the deceased partner, in the proportions following; viz. —

From the share of Sir *David Wedderburn*, $\frac{2}{12}$ths - -	£3875	14	10
estate of *David Webster*, $\frac{5}{12}$ths	9689	7	0
John Wedderburn, $\frac{5}{12}$ths -	9689	7	0
	£23,254	8	10

To every item of debt contained in the aggregate I have mentioned, as well those which are stated to be due to or from strangers, as those stated to be due to or from *J.* and Sir *D. Wedderburn*, and due to the estate of Sir *D. Webster*, there is a reference to a folio in the ledger, from which it may be presumed, that some information respecting those items was to be obtained.

The account then, assuming that *D. Webster*'s share of the computed deficiency is to be deducted from the amount standing to his credit in the ledger, *i. e.* deducting 9689*l.* 7*s.* from 75,292*l.* 17*s.* 9*d.*, states the sum of 65,603*l.* 10*s.* 9*d.* as the balance to be paid to the estate of *David Webster*, by his executors, provided the debt due from the estate of *James Wedderburn* were paid by *John Wedderburn*; and the account then states, how that sum, when received, was to be appropriated; and it says, that 9327*l.* 7*s.* 10*d.* is to be applied in payment of a debt due from the estate of the testator, *David*, to his son Sir *James*, and that the remainder, 56,211*l.* 2*s.* 11*d.*, was to be divided amongst the testator's children; the sums previously advanced to the children, are stated to amount to 18,857*l.* 3*s.* 11*d.*, which being added to the 56,211*l.* 2*s.* 11*d.*, they make together 75,068*l.* 6*s.* 10*d.*; and this is the sum on which the shares of the children

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are computed; the share of Sir *James*, being $\frac{7}{23}$rds of the whole, is stated to be 22,846*l.* 17*s.* 10*d.*, and deducting from that 11,447*l.* 11*s.* 2*d.*, the amount already advanced to him, the sum payable is finally stated to be 11,399*l.* 6*s.* 8*d.*

I think that this account, which affords no explanation of the dealing of the surviving partners with the interest of *David Webster*'s share in the concern, is not such an account as *John* and Sir *David Wedderburn*, the surviving partners of *David Webster*, the executors of his will, and the guardians of his children, ought to have rendered to the eldest son, on his coming of age. Every thing ought to have been clearly and fully explained. Whether a clear and full account might have been obtained, by searching through the books, from the references contained in the accounts which were rendered, I do not know; but if the fact were so, I think that was not enough; I think that direct and clear information of all the transactions, and of his interest in them, ought to have been given to Sir *James;* and there is nothing to explain, what were the circumstances under which Mr. *Alexander Murray* became, and acted as the solicitor of Sir *James*, and as it is said, of the other children of *David Webster*, who were then infants; or what were the views and considerations, on which Mr. *Alexander Murray* was satisfied, that the accounts were made out on a proper principle, as Mr. *Keil* says he was.

The deed of the 16th of *September* 1809, is made between *John Wedderburn*, described as surviving executor of *James Webster* deceased and one of the acting executors of *David Webster* deceased, of the one part, and the Plaintiff, Sir *James*, then a cornet in his Majesty's 10th regiment of dragoons, and a legatee named in the wills of *James Webster* deceased, and *David Webster* deceased,

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of the other part; it recites the circumstances under which the debt of 9392*l.* 7*s.* 10*d.* had become due to the Plaintiff, Sir *James*, from his father; and after reciting the will of *David Webster*, but taking no notice of the partnership deed of 21st of *May* 1796, it stated the balance upon the accounts apparently due to the Plaintiff, Sir *James*, to be 11,399*l.* 6*s.* 8*d.*, exclusively of the debt of 9392*l.* 7*s.* 10*d.* (*a*) The deed then recited, that a considerable part of the personal estate of *David Webster* consisted in his share of a large sum of money due from the estate of *James Wedderburn* deceased, which would not be recovered, and could not be received and got in for some years to come; and that the Plaintiff, Sir *James*, had urgent occasion for the sum of 9392*l.* 7*s.* 10*d.* for the payment of his debts: and it had been proposed and agreed, that, in order to meet such his wants, *John Wedderburn*, as acting executor of *David Webster*, should pay that debt, with interest, to the Plaintiff, Sir *James*, on or before the first day of *August* 1810: and that the 11,399*l.* 6*s.* 8*d.*, the balance of his share of his father's residuary estate, should be paid by *John Wedderburn* to the Plaintiff, Sir *James*, by seven equal annual instalments, with interest to be computed from the 1st day of *August* 1809, and the last instalment being

(*a*) The deed then recited, "that the residue of the personal estate of the said *David Webster*, after payment thereout of his debts, and amongst them, the said debt so due to the estate of the said *James Webster*, is *considered or supposed* to amount, to the sum of 75,068*l.* 6*s.* 10*d.* sterling, upon the account made up and indorsed on these presents, whereof the said *James Webster Wedderburn* did, upon his coming of age on the said 31st of *May* 1809, become entitled unto $\frac{7}{23}$rd parts of the whole, amounting in the whole to the sum of 22,846*l.* 17*s.* 10*d.*," whereout being deducted the sum of 11,447*l.* 11*s.* 2*d.*, the advances to him, the balance upon the said accounts *apparently due* unto the said *James Webster Wedderburn*, from the estate of *David Webster*, was 11,399*l.* 6*s.* 8*d.*, exclusively of the 9,392*l.* 7*s.* 10*d.*

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being to be paid on the 1st day of *August* 1816; it being understood, and expressly agreed, that *John Wedderburn* was to undertake for the payment of such instalments, not in his capacity of executor, but on his own private account, he being the legal personal representative of *James Wedderburn*, and also beneficially interested in his estate. The deed then witnesses the covenant of *John Wedderburn* to that effect, and further witnesses as follows: — "That he the said *James Webster Webster*, (meaning the Plaintiff, Sir *James*,) is now content and satisfied with the disclosure thus far made, and the accounts thus far given by the said *John Wedderburn*, of the personal estate of the said *David Webster*;" and of the sum of 9392*l.* 7*s.* 10*d.*, and no more, being justly due from the said estate, on the account therein mentioned, and of the said principal sum of 11,399*l.* 6*s.* 8*d.* being due to him, from the same estate, under the will of *David Webster*; and that as long as *John Wedderburn* performed his covenants, the Plaintiff, Sir *James*, would not require, or by suit at law or in equity demand payment of the sums so agreed to be paid to him. And there was a proviso, that the deed, or the agreement therein contained, was to be understood as applying only to the account and state of things as on the 1st day of *May* 1809, and as then accounted for, and as not precluding or preventing him from claiming, or becoming entitled to, any further part or share, sum of money, and other personal estate under the will of *James Webster* and *David Webster*, or either of them, not as yet received, fallen in, or accounted for.

I conceive that the expressions in this deed, as to the supposed amount of the estate of *David Webster*, and to the estate not yet received, fallen in, or accounted for, were meant only to have reference to the uncertain amount of the debts, stated to be owing to the old partnership, which might be recovered. But after the most careful consideration

consideration of the accounts, and of the provisions expressly contained in the deed, and having regard to the relation which subsisted between the parties, I am of opinion, that the Plaintiff, Sir *James*, was not, by the execution of this deed, precluded from enquiring into the mode, in which the assets and property of the old firm had been dealt with by the new firm; or from claiming any benefit, to which he might be entitled, in consequence of such dealing.

In the year 1810, and before any of the other children came of age, *John* and Sir *David Wedderburn*, and Mr. *Andrew Colvile*, all of whom had been partners in the firm of *Wedderburn*, *Webster* and Co., and who then constituted the firm of *Wedderburn* and Co., admitted *James Wedderburn* and the Defendant, *Alexander Seton*, into partnership with them, and this new partnership carried on the former business, under the same name of *Wedderburn* and Co. This new firm, with its additional partners, seem to have stood in the same relation to the old firm of *Wedderburn*, *Webster* and Co., and the estate of *David Webster*, as the first firm of *Wedderburn* and Co. did.

The daughter *Anne*, now deceased, the wife of the Plaintiff, *Archibald Murray Douglas*, attained her age of twenty-one years in 1812. [The Master of the Rolls here referred to the accounts furnished, and a deed of the 29th of *August* 1812 executed by her, which did not materially differ from those affecting Sir *James*'s share.]

I am of opinion, that *Anne Webster*, by executing it, was not precluded from enquiring into the mode in which the assets and property of the old firm had been dealt with by the subsequent partnerships, or from claiming

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any benefit, to which she was entitled, in consequence of such dealing.

On the 13th of *September* 1813, the daughter *Mary*, now the Plaintiff, Mrs. *Hawkins*, attained her age of twenty-one years; the account stated to have been rendered to her, appears to have been similar to that which had been rendered to her sister *Anne;* and she executed a deed dated 24th of *September* 1813, only 11 days after she came of age. [The Master of the Rolls stated the deed executed by *Mary Wedderburn Webster*, which was similar to that executed by her sister.]

It is stated by the Defendants, that on the 1st of *May* 1814, a further account was made out, and a further dividend made amongst the children; but it does not appear, and is not alleged, that any further settlement was then made. In 1815, Sir *David Wedderburn* retired from the business, and the trade was afterwards carried on by the continuing partners, *John Wedderburn*, *Andrew Colvile*, *James Wedderburn*, and *Alexander Seton*, under the new style or firm of *Wedderburn*, *Colvile* and Co.; and by transfers, or entries made in the books, the debt due from the estate of *James Wedderburn* deceased, was then purported to be paid off. On the 1st of *May* 1809, this debt was said to amount to 159,707*l.* 16*s.* 8*d.*; on the 1st of *May* 1815 to 202,855*l.* 0*s.* 3*d.*; and on that day, the estate of *James Wedderburn* deceased was credited, in account, with 183,989*l.*, said to be due by *Wedderburn*, *Webster* and Co., to *Wedderburn* and Co., and transferred by them to the *debit* of *James Wedderburn*'s estate; and also with 18,865*l.* 5*s.* 9*d.* said to be charged, in account, to *John Wedderburn;* but, except by those transfers in the books, no alteration seems to have been made in the relation which subsisted between the firm and the old house

house of *Wedderburn, Webster* and Co., or the estate of *David Webster*.

On the 15th of *May* 1816, the infant son *David* died; and, thereupon, his expectant share of the testator's estate became divisible, under the will, amongst his brothers and sisters, in certain proportions. The Defendants say, that the executors computed what was payable to the other children, in respect of *David*'s share, up to the 25th of *December* 1816, and made distribution accordingly, placing the share of *Charles*, the only remaining infant, to his credit. *Charles* attained his age of twenty-one years on the 10th of *September* 1820, and the Defendants say, that, thereupon, an account in writing was made out, of all sums of money expended for his maintenance, education and advancement in life; and also an account, of what was due for his share of the estate of the testator; and that the Plaintiff *Charles* examined and approved of such accounts.

It appears, that he (*Charles*) executed a deed poll, dated the 13th of *September* 1820, which, after reciting the will of his father, *David*, and that he had attained twenty-one years of age, and become entitled to a share of the residuary estate: and "that *John* and Sir *David Wedderburn* had submitted to him, an account of the residuary personal estate, and of all the receipts and payments respecting his expectant share thereof, during his minority, including the expense of his maintenance and education, and otherwise, all which he had examined and did fully approve;" and that he found that his share consisted of 29,160*l.* 10*s.* 3*d.* 3 per cent. consolidated Bank annuities, which had been transferred to him by *John* and Sir *David Wedderburn*:—of 2264*l.* 16*s.* 10*d.*, with interest from *May* then last, which had been paid to him by *John Wedderburn*:—of 728*l.* 8*s.* 3*d.*, with in-

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terest from *May* then last, which had been paid to him by Sir *David Wedderburn*: and of 329*l.* 6*s.*, which had been paid to him by the firm of *Wedderburn, Colvile* and Co., as the agents of *John* and Sir *David Wedderburn*; *Charles Webster*, in consideration of such transfer and payment, which were acknowledged, *remised and released unto John and Sir David Wedderburn, all actions, claims and demands which he ever had, or then had, against them, or the representatives of David Webster*, for, touching, or concerning the management and disposition of the residue of the personal estate of *David Webster*, or any part thereof, or any interest or annual produce by them received on account thereof; but with a proviso, that the release should not extend to any funds set apart to answer the annuity to Lady *Douglas*. (*a*)

It does not appear that any account was indorsed on this deed; but on looking at the account, No. 11., which is marked on the back "*Charles Webster* — received from *Wedderburn* and Co., 12th *July* 1820," and which in every thing, but a small difference in the amount of stock, and in the sum stated to be due from *Wedderburn, Colvile* and Co., corresponds with the results stated in the deed poll, and which, I presume, is the account therein referred to, it appears that the account of the 1st of *May* 1809 is assumed to be correct; and that the fortune or sum payable to *Charles*, is computed on that as a basis; and I find no reason to think, that the nature of the proceedings, which took place between the testator's death and the 1st of *May* 1801, were ever communicated to *Charles*; and having always regard to the relation subsisting between *John* and Sir *David Wedderburn*,

(*a*) These consisted at the time of the sums of about 3414*l.* 5 per cents., and 3888*l.* 4 per cents., producing an income of 426*l.* a year.

Wedderburn, and *Charles Webster*, their ward, and *cestui que trust*, I am of opinion, that, according to the principles upon which this Court constantly acts, *John* and Sir *David Webster* were bound to communicate with *Charles*, fully and particularly, the nature of their dealing with the testator's estate, and also the manner in which his interest was, or might be affected by such dealing; and that, under the circumstances, *Charles* was not, by the execution of the release, precluded from farther investigation and claim.

In the year 1821, *John Wedderburn*, one of the executors, guardians and surviving partners, died, having made a will, whereby he appointed his surviving partners in the firm of *Wedderburn*, *Colvile* and Co., viz. *Andrew Colvile*, *James Wedderburn* and the Defendant, *John Wedderburn*, his executors. They proved the will, and also carried on the trade, and they afterwards took the Defendant, *John Wedderburn*, into partnership with them. The business of this new partnership was carried on under the firm of *Colvile*, *Wedderburn* and Co.

In *May* 1822, an account was come to, between the executors of *John Wedderburn*, and Mr. and Mrs. *Archibald Murray Douglas* and their trustees. By the account and deed of 29th *August* 1812, the sum of 9891*l.* 17*s.* 5*d.* was stated to be due to the daughter *Anne;* and *John Wedderburn* covenanted to pay that sum, by instalments, the last of which was to be paid on the 1st *August* 1816. In *August* 1814, a marriage was agreed upon between *Anne* and the Plaintiff *Archibald Murray Douglas*, and marriage articles, dated *August* 6th, 1814, were executed between these parties and their trustees, who were the Plaintiff, Sir *James*, and a Mr. *William Douglas*, since deceased; and thereby it was covenanted, that the fund to which *Anne Webster*, the

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the intended wife, was entitled, should be assigned to the trustees, on the contemplated trusts. The marriage took effect; *John Wedderburn* died, without having fully paid what was due to Mrs. *Douglas*; *George Hawkins* was appointed a trustee in lieu of *William Douglas*; a settlement was executed pursuant to the articles; and, upon an account stated between the parties, it appeared, that 3456*l.* 15*s.*, remained a balance due to Mrs. *Douglas*, or her trustees, in respect of the 9891*l.* 17*s.* 5*d.* mentioned in the deed of *August* 1812; and that sum was paid to the trustees, the Plaintiff Sir *James Webster Wedderburn* and *George Hawkins*; and thereupon, an indenture, dated 22d of *May* 1822, and made between the Plaintiffs, Sir *James Webster Wedderburn* and *George Hawkins*, of the 1st part; the Plaintiff *Archibald Murray Douglas* and *Anne*, then his wife, of the second part; and *James Wedderburn*, and the Defendants, *Andrew Colvile* and *Alexander Seton*, of the third part, was executed; and thereby, it was witnessed, that the trustees and Mr. and Mrs. *Douglas* released and discharged *James Wedderburn*, *Andrew Colvile* and *Alexander Seton*, and the estate of *John Wedderburn* deceased, from the 9891*l.* 17*s.* 5*d.*, which remained due to Mrs. *Douglas*, as appeared by the deed of 29th of *August* 1812; and which was thereby secured to be paid, by five instalments, as therein mentioned, and from all actions and demands in respect thereof, or relating thereto.

This was the last deed executed by any of the parties; on the occasion of its execution, no reference appears to have been made to the state of the accounts, between the old firm of *Wedderburn*, *Webster* and Co., or the estate of *David Webster* and the surviving partners, or the subsequent firms. It had relation only to the sum of 9891*l.* 17*s.* 5*d.*, which, by the deed of 29th of *August*

August 1812, appeared to be due to Mrs. *Douglas*, and the effect of it was, to admit that that sum was paid.

And, on a consideration of all these accounts and documents, I think that the accounts were not, and could not, by any of the parties, be considered as finally wound up and settled. They were all founded on the account of 1st of *May* 1809, which was, in part, merely an hypothetical account, founded on a supposition that no more of the debts due to the concern, exclusively of that due from the estate of *James Wedderburn*, would be received, than was sufficient to pay the debts due from the concern, which it was assumed would all be paid; and it was necessarily intended to enquire, some time or other, how far this supposition corresponded with the event.

Moreover, the estate was subject, or supposed to be subject, to the payment of two annuities, one of 500*l.*, given by the will to the Defendant, Lady *Douglas*, and the other of 20*l.*, payable to a Mrs. *Young*; and it is necessary to consider, what was done with respect to investments, to answer these annuities, not only, with a view to the liability with which the Plaintiff seeks to charge the executors on that account, but also, with a view to the effect of the general transactions between the parties. [The Master of the Rolls, after reviewing the facts relating to this part of the case, said,]

I think, that very long before they made any complaint, they (the children of the testator) were apprised of the sort of provision which was made for payment of the annuities; and, under the circumstances, I think that I cannot, at their instance, charge the executors and trustees with such loss, if any; and it appears to me that there was some, as was incurred by the neglect to make investments

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investments in the 3 per cent. consols, as soon as practicable.

In the latter part of the year 1828, and the beginning of 1829, the Plaintiff, Sir *James*, demanded some further accounts and explanations. As far as I can understand his letters, which I find in the admitted correspondence, his demands related only to the debts which were unpaid in *May* 1809, and to transactions which occurred subsequent to that time; but some accounts were delivered, and, before the 5th of *May* 1829, had been subject to the examination of Messrs. *North* and *Smart*, who then hesitated to approve of them; and on the 2d of the following month of *November*, they expressly allege, as I think, for the first time, that the accounts were not satisfactory, on these grounds; the first of which, was the use of the funds of the testator in the affairs of the copartnership, without accounting for the profits during the time such funds were so used. Whilst the question, thus raised, was pending, and in *May* 1830, Mr. *James Wedderburn* retired from the concern, and the business was afterwards carried on by Messrs. *Colvile* and *Seton*, under the firm of *Colvile* and Co.

The bill was filed on the 1st of *February* 1831, and, under all the circumstances of this case, and after a careful examination of all the particular transactions between the parties, it appears to me, that the main question in the cause, whether the Plaintiffs are entitled to participate in the profits of the trade carried on after the 1st of *May* 1801, depends on the question, whether they are barred by the length of time which elapsed, before the bill was filed. The testator died in *March* 1801, about thirty years before the bill was filed, — the Plaintiff,

tiff, Sir *James Webster Wedderburn*, attained his age of twenty-one years in *May* 1809, about twenty-two years before the bill was filed; and the Plaintiff *Charles Wedderburn Webster*, the youngest surviving child, attained his age of twenty-one years in *September* 1820, more than ten years before the bill was filed; various accounts had been signed, and the claims of the several children had been, at least to some extent, examined, and no claim for a participation of profits was ever made till 1829.

In *Gregory* v. *Gregory* (*a*), and *Champion* v. *Rigby* (*b*), the Court dismissed bills, upon which, if filed early, the Plaintiffs would have been entitled to relief, on account of a delay of eighteen years; and it was justly argued, that the time is no bar, in cases of direct trust; it may be otherwise, if there has been a direct and independent dealing between the trustees and *cestuis que trust*, after the relation has terminated.

Time is no bar in cases of direct trust; it may be otherwise, if there has been a direct and independent dealing between the trustees and *cestuis que trust*, after the relation has terminated.

In this case, notwithstanding the relation of trustees and *cestuis que trust*, and of guardian and ward, if complete and satisfactory information had been given; if I could have been satisfied, on examination of all the documents and evidence, that the children, respectively, on their coming of age, had been duly informed of the real nature and effect of the transactions, or seeming transactions, which the executors and surviving partners took upon themselves to arrange, between themselves and the estate of their deceased partner and testator; and if the relation between trustee and *cestuis que trust* had then ceased, I should have thought time would have been a bar; I should not have thought it right, to open the investigation of transactions so long treated as

(*a*) *Coop.* 201. (*b*) 1 *Russ. & M.* 539.

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as closed. But, on a review of the whole case, I am of opinion, that full information, such as trustees and guardians are bound to give, especially in a case where personal interests of their own were involved, never was properly communicated: and that, in fact, sufficient information was not obtained, till a short period before the time when the claim was made in 1829, and it is plain that the accounts were never finally settled: and that the relation between trustee and *cestuis que trust*, has not yet wholly terminated: and, under all the circumstances, I am of opinion, that the Plaintiffs, as the persons beneficially interested in the estate of *David Webster*, are entitled to participate in the profits of the trade carried on after the 1st of *May* 1801.

Considering, however, that the Plaintiffs are entitled to participate in the profits of the concern after the 1st of *May* 1801, it remains to be determined, how the profits, of which they are to partake, are to be computed; and how their share of such profits is to to be ascertained.

It is one thing to say, that the sale by the executors to themselves, as surviving partners, is void, and to seek relief on that foundation; and another, and very different thing, to say, without seeking to set aside the sale, that the purchase money was insufficient, or that the amount of a large part of it, was retained and employed in the trade, and to seek relief on that ground.

If the sale of *David Webster*'s share of the partnership property, by the executors to themselves, were to be treated as altogether void, the consequence would be, that his estate would retain a continuing interest in the property, in specie, and it would have to be considered, what ought now to be done with the property.

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But this bill is not framed like that in *Cook* v. *Collingridge*. It does not pray to have the sale declared void; it does not ask for any disposition to be now made of the property; and, as I understand its object, the Plaintiff desires to obtain that which was intimated in the letter of Messrs. *North* and *Smart*, an account of the profits, during the time the funds of the testator were employed in the copartnership; meaning, I presume, by funds, the value of the testator's interest; and, considering this as the object, and as the species of relief to which the Plaintiffs are entitled on their bill, it is to be seen, how the profits are to be ascertained upon that foundation.

Since the 1st of *May* 1801, new partners have from time to time been admitted, and have retired; their personal services, in managing the concern, and the capital which they may have from time to time employed in it, must have contributed in the earning of those profits in which the Plaintiffs claim to share; and allowance must be made for them.

On the other hand, large sums of money have, from time to time, been taken out of the concern, and applied to the separate purposes of the estate of *David Webster*, or for the benefit of his residuary legatees; and considering these sums, as paid on account of profits and purchase money of capital, the contribution of the testator's estate, towards the earning of the profits of the concern, and the share of the future profits, to which the testator's estate would be entitled, would diminish with every payment on account of capital, and in proportion to it.

Having regard to the frame of this record, I think that the Plaintiffs are not entitled to the sort of decree which

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which was made in *Cook* v. *Collingridge*, but are entitled to have it ascertained, what was the value of *David Webster*'s interest in the concern, on the 1st *May* 1801; and to have a share of the profits subsequently made by the concern; such share of profits to be proportioned to the shares which that value, or so much of it as was, from time to time, left in the concern, bore to the capital of all the other partners, from time to time employed by them.

If, upon consideration, the Plaintiff should think that the valuations were justly and fairly made in the year 1801, a direction might be given not to disturb those valuations.

I think that the continuing firms are not entitled to any credit for any mere transfer, in account, between the books of themselves and the books of *Wedderburn, Webster* and Co.; but, that they are to be entitled to credit, and to be exonerated, in respect of every payment or investment made on the account of *David Webster*'s estate, or any of the parties interested in it.

Form of decree for an account of a deceased partner's interest in a mercantile firm, where, since his death, new partners have, from time to time, been admitted, and have retired, and have employed their services and capital therein.

Refer it to the Master, &c., to take the usual accounts of the personal estate of the testator, *David Webster*, possessed or received by his executors, &c., and of their payments on account thereof.

Also, to take an account of the dealings and transactions of the partnership firm of *Wedderburn, Webster* and Co., up to the 1st day of *May* 1801; not disturbing any account which he shall find to have been settled by the testator.

Let

Let him enquire what, on the 1st day of *May* 1801, was the value of testator's interest in the concern.

Let him take an account of the profits of the trade, as the same have been, from time to time, carried on by the successive firms of *Wedderburn* and Co., *Wedderburn*, *Colvile* and Co., *Colvile*, *Wedderburn* and Co., and *Colvile* and Co., and the partners constituting those firms respectively.

And let him ascertain what sums of money were, from time to time, taken out of the said concern, and paid, applied, or invested, to or on account of the estate of *David Webster*, or any of the persons beneficially interested therein; and also, what was the amount of capital, from time to time, employed in the said firms respectively, by the several and respective partners therein: with liberty to state special circumstances.

Direct examination on interrogatories, and production of documents. And, in taking the accounts, the Master is to make, unto all parties, all just allowances; and as to such of the said allowances as are claimed, or objected to, before the Master, he is to state his reasons for allowing or disallowing the same.

Reserve further directions and costs — and liberty to apply.

The decree was affirmed by the Lord Chancellor on the 9th of *November* 1838.

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March 12.

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A. and other parties entitled to a testator's estate, by power of attorney, appointed *B.* to collect and manage the estate; *B.* employed *C.*, a solicitor for that purpose, who received the assets, and after deducting the amount of his untaxed bill of costs, paid over the balance to *B.* *A.* filed a bill against *B.* and *C.* for an account, and for the delivery up of documents relating to the testator's estate. Held, that *A.* was not entitled to the production of documents relating to the testator's estate, admitted by *C.* to be in his possession.

THE original bill, which was filed against Mr. *Fisher*, a solicitor, alone, alleged that the Plaintiff, being entitled to the residuary estate of *John Collinridge*, had employed the Defendant, as his attorney and solicitor, to get in and manage the estate of the testator. It stated, that the Defendant had received divers monies, in the course of such employment, and that he had in his possession, title deeds and papers, relating to the testator's affairs; and it prayed for an account of the monies received, and for the delivery up of the documents.

The Defendant *Fisher*, by his answer, admitted the receipt of the assets of the testator, but he denied that he had been employed as the solicitor, or attorney of the Plaintiff; he stated, that the Plaintiff and other parties interested in the estate, had executed a power of attorney, appointing a Mr. *Pinckard*, their attorney, to get in the estate of the testator, and to appoint an attorney, or substitute under him for that purpose. That Mr. *Pinckard* had retained the Defendant, as solicitor, in the matters of the estate; and that the Defendant, having received the assets of the testator, to the amount of 672*l.*, had paid over the balance, after deducting 560*l.*, the amount of his bill of costs, to *Pinckard*; and had obtained a receipt from *Pinckard* for the same, thereby expressly admitting the amount of the balance. He admitted, that the bills of costs had never been taxed, and that he had in his possession divers documents, relating to the testator's estate and affairs, and relating to the matters in the bill mentioned, a list

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a list of which was set forth in the schedule: he however denied the Plaintiff's right, to call for their production.

On the 4th of *December* 1835, the Plaintiff moved for the production of these documents, but the motion was refused with costs. The Plaintiff then amended his bill, and he made the representative of *Pinckard* (who was dead) a Defendant thereto; and he thereby still insisted, that *Fisher* had been employed as the Plaintiff's attorney: and charged fraud and collusion between *Pinckard* and *Fisher;* this, however, was denied by the answer. The amended bill stated, as a fact, the execution of a warrant of attorney to *Pinckard.* The further answer of *Fisher* denied the alleged fraud, and again insisted, that he was the attorney of *Pinckard,* and not of the Plaintiff, and consequently, not bound to produce the documents admitted to be in his possession. The representatives of *Pinckard* admitted the possession of some other papers.

Mr. *O. Anderdon* moved, as against both Defendants, for the production, for the usual purposes, of the documents in their possession.

Mr. *Pemberton* and Mr. *Bagshawe,* contrà.

The MASTER *of the* ROLLS ordered the production of the documents in the possession of the representative of *Pinckard;* but on the ground of want of privity between the Plaintiff and *Fisher,* he refused the motion, as regarded *Fisher,* with costs.

The Plaintiff appealed from this decision, which was affirmed by the Lord Chancellor, on the 15th *June* 1838.

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Nov. 4. 11.

KAMPF *v.* JONES.

A testatrix bequeathed and appointed 1,800*l.* consols and 300*l.* long annuities, and all monies over which she had the power of appointment, under a particular deed, and all the residue of her personal estate, upon certain trusts; Held, that the gift of the consols and long annuities was specific.

One having a power of appointing a fund amongst "her children, or remoter issue," appointed a sum to one of her children absolutely, and then attempted to limit it over to the unborn children of such child. The appointment to the grandchildren being too remote: Held, that the prior absolute gift to the child was effectual.

BY an indenture, dated the 28th of *December* 1815, certain *Carnatic* stock and 5 per cents. were vested in trustees, upon certain trusts (so far as it is material to state them), for Mrs. *Kampf* for life, with remainder to her children, or their issue, born in her lifetime, in such proportions, and subject to such conditions, as she should appoint: and in default of appointment, or in case of an incomplete appointment, in trust for the children equally.

By a settlement, dated the 17th of *November* 1817, certain other funds were settled, upon trust, for Mrs. *Kampf* for life, and, after her death, as to one moiety, "in trust for all and every, or such one or more exclusively of the other, or others of the children or remote issue of Mr. and Mrs. *Kampf*, born in her lifetime, for such interest or interests, to be divided between or among them, if there should be more than one object of the power, in such shares, and to be chargeable with such sum or sums of money annual or in gross, to be payable to them or any of them, at such ages, days, or times, not more remote than twenty-one years from the decease of the said Mrs. *Kampf*, with such remainders or limitations over, between or among them, or any of them, with such provision for their, or any of their maintenance, or advancement, subject to such conditions, with such restrictions, and generally in such manner for their or any of their benefit as Mrs. *Kampf* should appoint; and, in default of such appointment, in trust, for all the children, who being a son should attain twenty-one; or being

being a daughter, should attain that age or marry with consent.

The testatrix, by her will, in exercise of the power contained in the deed of 1817, amongst other things, directed and appointed, the moiety of the funds, then subject to the trusts of the settlement of 1817, should go and be divided between her five remaining children, *Henry B. Kampf*, *William B. Kampf*, *Edward T. Kampf*, *Charles F. Kampf* and *Emily Frances Kampf* in equal shares; and she directed "that the share of *Emily Frances* should be considered a vested interest in her, upon her attaining the age of twenty-one years, or day of marriage, which should first happen; so that the said marriage should be with the previous consent, in writing, of the said trustees or trustee for the time being of her said will; but she directed, that the said share of her said daughter, *Emily Frances*, should be vested in the names of her said trustees jointly with her said daughter, upon her attaining the age of twenty-one years, or on the day of her marriage with such consent, which should first happen; and that the same should be held by the said trustees, upon trust, during the life of her said daughter, *Emily Frances*, to pay to, or permit her to receive the dividends, interest and annual produce thereof, for her separate use and benefit, independently of the debts, control, or engagements, of any husband, with whom she might intermarry; and after the decease of her daughter, *Emily Frances*, upon trust, to pay, assign and transfer the principal trust funds, in which her said share should be invested, unto, between and amongst the issue of her said daughter, if any, and if more than one child, share and share alike; and if she should die without issue, then unto and amongst the next of kin of her said daughter, *Emily Frances*, at the time of her decease; but nevertheless, the said testatrix directed,

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that at the desire of her said daughter, upon her attaining her age of twenty-one years, or being married with such consent, she should be entitled to receive the sum of 500*l.*, part of the said principal money, for her own absolute use." And the testatrix directed, that her four sons and daughter, last named, should be entitled to benefit of survivorship amongst them, in the event of the death of any one or more of her said sons, under the age of twenty-one years, or of her said daughter, *Emily Frances*, under that age, or without being, or having been married with such consent as aforesaid. And as to all those two sums of 1800*l.* 3 per cent. consolidated Bank annuities, and 200*l.* long annuities, then respectively standing in her name, in the books at the Bank of *England*, and also, as to all and every the monies, stocks, funds and securities for money, of, or to which she, the said testatrix, had power of appointment under or by virtue of the indenture of the 28th of *December* 1815, and all the residue of her personal estate, she, the said testatrix, gave, bequeathed, directed and appointed the same unto her said trustees, upon trust, to collect, get in and receive all debts and sums of money that might be due to her at the time of her death; and, at the end of three calendar months next after her decease, to sell and dispose of, and convert into ready money, all her household goods and furniture, plate, linen, and china, and all such other parts of her said residuary estate and effects as were in their nature saleable, and to invest the monies, and to stand possessed of the said consolidated Bank annuities, long annuities, monies, securities for money, and her said residuary personal estate, and the stocks, funds, and securities upon which the same should be invested, upon the same trusts as thereinbefore mentioned, of the moiety thereinbefore by her appointed, of and in the trust monies, funds and securities, estates and premises comprised

prised in, or therein subject to, the said indenture of settlement of the 17th of *November* 1817, or as near thereto as might be.

The testatrix died in *March* 1833: at the time of her death, her daughter *Emily Frances* was an infant, and unmarried, and had no child.

The general assets of the testatrix were insufficient to pay her debts and the other legacies given by her will.

There were several questions discussed on these instruments, the principal of which were, first, Whether the bequests of the sums of 1800*l.* consols and 200*l.* long annuities, mentioned in the residuary clause, were to be considered as specific, or general legacies; and secondly, Whether the interests appointed to the unborn children of *Emily Frances*, which were too remote, belonged to her, or were divisible between all the children of the testatrix, in consequence of the default of appointment; it being contended, on her behalf, on the authority of *Carver* v. *Bowles* (*a*), that the fund being well appointed to her in the first instance, the absolute gift to her of one fifth, had not been cut down by the subsequent ineffectual gift over to her children; and that, consequently, she was absolutely entitled to that portion of the fund.

On behalf of the other children, it was contended, that the testatrix had appointed one fifth to *Emily Frances*, for life only; that the appointment to her children was invalid, and that the interest intended for them, was, therefore, divisible amongst all the children of the testatrix equally, as in default of appointment.

Mr.

(*a*) 2 *Russ. & Myl.* 301.

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Mr. *Kindersley* and Mr. *Whitmarsh*, for the Plaintiff.

Mr. *Torriano*, for *Emily F. Kampf*.

Mr. *Tinney*, Mr. *Pemberton*, Mr. *Treslove*, Mr. *F. Whitmarsh*, Mr. *Girdlestone*, Mr. *Spence* and Mr. *Cooper*, for other parties.

Nov. 11. *The* MASTER *of the* ROLLS [after stating the case.]

The next question which has been raised here is, Whether the sums of 1800*l.* consolidated Bank annuities and 200*l.* long annuities, are to be considered as specific legacies, or general legacies. [His Lordship read the terms of gift.]

In the first place, supposing the testatrix had those two sums of 1800*l.* 3 per cent. consolidated Bank annuities and 200*l.* long annuities, the description, is such as to make the gift specific; — it separates this portion of the property of the testatrix, from every other portion of her property; and, I do not think the words contained in the subsequent part of the will, alter the effect which is produced by the specific descriptions contained in the former part of the will; and, therefore, I think, in the administration of this estate, these sums must be treated as specific legacies.

Another question was, whether the interests appointed to the children of *Emily Frances* belonged to her, or were to be treated as passing to the children, in default of appointment; with respect to that, the case stands thus; there was a power of appointment among the children, or remoter issue, living at the death of the appointor; *Emily Frances* was under age, and unmarried,

ried, and had no children living at that time; but the testatrix, in making the appointment amongst the children, in whose favour she exercised it, expresses herself thus. [His Lordship stated the gift to the five children including *Emily Frances.*] Here certainly is a full and complete appointment.

[His Lordship then stated, the clause restricting the gift to *Emily Frances* for her life for her separate use.]

The power was conferred in terms to enable the donee to limit the interests, and it was to be given with such restrictions as she should think fit. There seems to be, in the clause which I have read, nothing contradictory, or excessive in the execution of that power; but then the testatrix proceeds: — [His Lordship read the gift over to the children of *Emily Frances.*]

I think that, upon the authority of the case of *Carver* v. *Bowles*, this is an absolute appointment for the benefit of this lady, subject only to such restrictions within the limits of the power, as are afterwards properly imposed on her. The difference between this case and the case of *Carver* v. *Bowles*, which strikes one at first, is, that in the case of *Carver* v. *Bowles*, the gift was contingent on whether the testator could do what he was about to do: he says, "so far as I lawfully or equitably can or may." Now I think, although those words are not contained in the clause in this will, yet the effect must, necessarily, be the same. She has used very nearly the same words, which were considered to give an absolute vested interest to the daughter. She has made limitations which, to a certain extent, were quite within her power; but she has attempted to make others which were beyond the limits of her power; and I think that the absolute gift ought to

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to have effect, subject to the limitations which were within the power, and free from the others. When this lady attains the age of twenty-one, she may find it for her benefit, that the gift to her should be subjected to to the limitations and restrictions which are imposed on her during her life. The way to provide for that (the fund being in Court) would be, to carry it to her account, with liberty to apply.

May 22.
June 1.

BURGESS *v.* THOMPSON.

The Plaintiff undertook to speed, and the terms were, that he should set the cause down for hearing, and serve a *subpœna* to hear judgment, in *Easter* term; he served the *subpœna* and set down the cause to be heard in *Easter* term; but the *subpœna* to hear judgment was returnable in *Trinity* term. Held, that this was not a compliance with the undertaking.

THE Defendant, before replication, having moved to dismiss the Plaintiff's bill, for want of prosecution, the Plaintiff, on the 22d of *June* 1836, undertook to speed the cause; by the terms of the order, he undertook "to give rules to produce witnesses and pass publication in *Hilary* term, and set the cause down for hearing, and serve *subpœnas* to hear judgment in the next following term, (*Easter*); and, in default thereof, it was ordered, that the Plaintiff's bill should stand dismissed with costs."

The Plaintiff complied with the terms of his undertaking, so far as related to the giving rules to produce witnesses and pass publication in *Hilary* term. He set down the cause in *Easter* term, and, on the last day of that term (8th of *May*), he served a *subpœna* to hear judgment, returnable in *Trinity* term (the 24th of *May*).

Mr. *James Parker* now moved to dismiss the bill, on the ground, that the *subpœna* to hear judgment was not returnable in *Easter* term, but in *Trinity* term.

Mr.

Mr. *Pemberton*, *contrà*, contended, that the Plaintiff had complied with the strict terms of his undertaking, and had served the *subpœna* to hear judgment in *Easter* term, which was the following term to *Hilary*.

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May 22.

The MASTER *of the* ROLLS said, there appeared an ambiguity as to the terms of the undertaking, and the seventeenth order, (1831) (*a*), which required the Plaintiff to set down his cause for hearing, and duly serve the *subpœna* to hear judgment, *returnable in the succeeding term* to that, in which publication passed. Considering the question which had been raised, he would not dismiss the bill, but would enquire as to what was understood to be the practice, and then dispose of the question of costs.

June 1.

The MASTER *of the* ROLLS said, he had made inquiries, and found that there was no doubt of the practice, as understood by the solicitors and the officers of the Court. It was, that the cause should have been set down for hearing on such a day, as to allow time to return the *subpœna* to hear judgment in *Easter* term. The difficulty had occurred from confusing the two dates namely setting down the cause, and setting down the cause for hearing, and as the Plaintiff had failed in his undertaking, he must pay the costs.

(*a*) 1 *Russ. & M.* 771.

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May 24.

CASE *v.* DROSIER.

The trusts of a term, limited previous to an estate tail, for raising extra portions on the death of a party without issue, was held invalid, as tending to a perpetuity: because, being limited antecedently to the estate tail, it could not be defeated by a recovery.

Two estates were devised to trustees, for 500 years, with remainder, as to one estate, to *A.* for life, with remainder to his first and other sons, in tail, with remainder to *A.*'s daughters, equally, in tail general, with remainder to *B.*, for life, with remainder to his first and other sons, in tail, with remainder to his daughters equally, in tail general. The other estate was, *mutatis mutandis*, similarly settled on *B.* and his issue, with remainder to *A.* and his issue.

The trusts of the term were declared to be, to raise 2000*l.* each, for *C.* and *D.*, "and if *A.* or *B.* should depart this life without issue, whereby the survivor of them would become entitled to" the two estates, to raise a further sum of 2000*l.* a piece, for *C.* and *D.*

B. died leaving issue, and afterwards *C.* died without issue, whereby the two estates centered in the issue of *B.*: Held, that the trust for raising the further sums of 2000*l.* did not take effect.

THIS case came before the Court upon demurrer to the whole bill.

The testator, *Benoni Mallett*, by his will, dated the 28th of *January* 1780, devised his estates at *Middleton* and *Testerton*, to trustees, for a term of 500 years, upon the trusts after declared; and subject thereto, the testator devised his estates at *Middleton*, in strict settlement, to his grandson *Thomas M. Case*, for life, with remainder to his first and other sons, in tail male, with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to *Philip M. Case*, for life, with remainder to his first and other sons, in tail male; with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to the testator's right heirs. The testator devised his tenements at *Testerton*, subject to the term, in a similar manner, to *Philip M. Case*, for life; with remainder to his first and other sons, in tail male; with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to *Thomas M. Case*, for life; with remainder to his first and other sons, in tail male; with remainder to his daughters, equally,

equally, as tenants in common, and the heirs of their respective bodies; with remainder to the testator's right heirs.

The testator declared the trusts of the term of 500 years to be, as to the hereditaments in *Middleton*, to pay an annuity of 150*l.* a year to *Martha Case*, and to raise 2000*l.* each, for his two grandaughters *Pleasance Case* and *Susannah Sarah Case*, payable at twenty-one, or marriage; and as to his hereditaments in *Testerton*, to raise an annuity of 100*l.* for the maintenance of *Philip Mallett Case*, until he should attain twenty-one; and he declared, "that all the hereditaments had been limited to his trustees for 500 years, upon further trust, that in case either of his grandsons, *Thomas Mallett Case* and *Philip Mallett Case*, should depart this life without issue, whereby the survivor of them would become entitled to all the said manors and premises comprised in the said term, as well at *Testerton* as *Middleton*, then that his trustees should, in like manner, raise and levy the further sum of 2000*l.* a piece, for the increase of the portions of his grandaughters, *Pleasance Case* and *Susannah Sarah Case*, and pay the same to them at their respective ages of twenty-one, or day of marriage, which should first happen," with benefit of survivorship, in case of the death of either, before both, or either of the said sums of 2000*l.* should be payable; and with a direction, that the last mentioned legacies of 2000*l.* and 2000*l.* should sink, and not be raised, in case both his grandaughters should die "under age and unmarried."

The testator further directed, that the term of 500 years should determine and be void, upon the full execution of the trusts thereof.

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The testator died in 1781, and left all his grandchildren surviving him. The testator's grandson, *Thomas M. Case*, died in 1800, leaving an only daughter, the Defendant *Mary*, the wife of *Thomas Wythe*, who became entitled to the *Middleton* estate. The testator's other grandson, *Philip M. Case*, died in 1834, without issue, whereby the *Testerton* estate became likewise vested in *Thomas Wythe*, in right of his wife *Mary Wythe*, as tenant in tail, subject to the term of 500 years and the trusts thereof.

Both granddaughters attained their majority. *Susannah Case* died unmarried, in 1802, and *Pleasance Case* died in 1821, leaving the Plaintiff her only child and administrator.

The Plaintiff, by this bill, insisted that, according to the true construction of the will of *Benoni Mallett*, the two further sums of 2000*l.*, on the death of *Philip Mallett Case* without issue, ought to be raised; and, by this bill, he prayed, that the trusts of the term of 500 years might be performed; and that it might be declared, that in the events that had happened, the two sums of 2000*l.* each, were a charge upon the estates comprised in the term of 500 years; and that the same, with interest, from the 4th of *July* 1834, might be raised.

To this bill, *Thomas Wythe* and *Mary* his wife filed a general demurrer, for want of equity, which now came on for argument.

Mr. *Tinney*, Mr. *Pemberton* and Mr. *Gardner*, in support of the demurrer, contended, first, that the event had not happened on which the additional portions of

2000*l.*

2000*l.* were given. These portions were to take effect in case of *Thomas* or *Philip* dying without issue, whereby the survivor would become entitled to all the manors; as *Philip*, who left no issue, survived *Thomas*, who left issue, the event contemplated, of the survivor becoming entitled to the two estates, never happened. That it would, probably, be contended by the Plaintiff, that the word "survivor" was in this, as it had been in some cases, to be construed as "other;" but this was a forced construction, which the Court will adopt, only in cases where such an intention appeared manifest on the face of the will; *Crowder* v. *Stone.* (*a*) That this was not the intention in this case was manifest, from the circumstance of the testator having given life estates only, to *Thomas* and *Philip*, so that it would not be sufficient to construe the word "survivor" to mean "other:" but, to give effect to the claim of the Plaintiff, it must be construed as "other, or the issue of such other," which was a much greater departure from the natural sense of the word survivor, than any of the cases authorised.

That if the words "depart this life without issue," were not limited to the lives of the tenants for life, then the gift of additional portions would be void, for remoteness, being after an indefinite failure of issue.

In *Bristow* v. *Boothby* (*b*) the estate of the wife was limited to the husband, for life; remainder to the wife, for life; remainder to the sons of the marriage, in tail male; remainder to the sons of the lady by any after taken husband, in tail male; remainder to the daughters of the wife, in tail general; remainder to the survivor of

(*a*) 3 *Russ.* 217. (*b*) 2 *S. & St.* 465.

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of the husband and wife, in fee; with a power to the wife, if the husband survived her and all the children of the marriage *died without issue*, to charge the land with a sum of money. The objection, which was successfully taken in that case, applies equally to the present; the power was held void, for remoteness, being limited after an indefinite failure of issue, not inheritable under the limitations.

Morse v. *Lord Ormonde* (*a*) will be relied on for the Plaintiff; there a testatrix devised to Lady *Ormonde*, for life; with remainder to her first and other sons, in tail male; remainder to her daughters, as tenants in common in tail; with remainder to trustees, for a term, to raise the legacies thereinafter given, from and immediately after the decease and failure of issue of Lady *Ormonde*. The persons who were interested in the lands insisted that the legacies were void, as depending on too remote a contingency; for they were not to take effect until a general failure of issue of Lady *Ormonde*, whilst the estates previously limited in the property, being first to her sons, in tail male, and then to her daughters, in tail general, included only sons and their male issue, and daughters and their issue; but did not include the daughters of sons and the issue of such daughters, or any female issue of the sons, or issue of such female issue; but it was held, that "failure of issue" was to be considered as a failure of such issue as were included in the limitation of the estate, and, therefore, that the gift of the legacies was not too remote; the decision, however, was founded on this, that the term commenced on failure of particular issue of Lady *Ormonde*, and the legacies were to be paid, immediately on the commencement of the term; the Court

(*a*) 5 *Mad.* 99. and 1 *Russ.* 382.

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Court, therefore, considered, that the failure of issue, upon which the legacies were given, must be construed as a failure of that particular issue, on which the term was to arise and the legacies were to become payable; namely, of the issue to whom the estate had been previously limited. The present case wants the circumstance, on which *Morse* v. *Lord Ormonde* was decided; namely, a limitation of a term, immediately after the estates given to the issue; here the term to secure the portions *precedes* the estate tail.

Another objection to the validity of these charges is, that the term of 500 years, out of which they are to be raised, is antecedent to the estate tail; and it is now settled, that such a term cannot be barred by a recovery suffered by a subsequent tenant in tail *Eales* v. *Conn* (*a*); the trust, therefore, cannot be barred, and is void, as tending to a perpetuity. In *Morse* v. *Lord Ormonde*, the term of 1000 years was subsequent to the estate tail, and was, therefore, liable to be defeated by a recovery; here, nothing but an indefinite failure of issue would determine the limitation of the term, and the trust attached to it; it is, therefore, such a limitation as the law will not endure. The law permits such a charge after an estate tail, as in *Morse* v. *Lord Ormonde*, not, because it allows a charge of this description to affect the inheritance for an indefinite period, but, because a remedy has been provided for defeating it, namely, a common recovery. Therefore, either the event has not happened in which the portions are raiseable, or the testator has attempted to give them in such a way, as to render them void.

Mr.

(*a*) 4 *Sim.* 65.

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Mr. *Kindersley*, Mr. *Richards* and Mr. *Heath*, in support of the bill.

The intention of the testator is clear; he had two estates, the *Middleton* estate and the *Testerton* estate. He had two grandsons, and two grandaughters, and his object was to provide for both, in such a way, that one grandson should be the stock of one family, and have one estate; and that the other should become the stock of another family, and inherit the second estate; being desirous of providing for his grandaughters, he directed portions to be raised for them out of the *Middleton* estate, and this was to be done independent of any contingency; the testator then considered, that one of the two grandsons and his issue might fail, the effect of which would be, that both estates would centre in the other line, and thus he could then afford to make a larger provision for the grandaughters, than if the two estates were divided between two families. This was the plain intention and scope of the will, and the question is, whether there is any rule of law which prevents this intention taking effect.

As to the first objection, that the words are to be construed strictly, and that the survivor never became entitled to the two estates, we contend, that it is manifest on the face of the will, that the testator intended the survivorship to apply to the stock, and not to the individual who was to be the founder of the line; and that the extra portions were to be raised, whenever the two estates became united in one family, and without reference to the tenant for life surviving or not; and there is authority for such a construction.

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In *Tollett* v. *Tollett* (*a*), two estates were settled on two sons, in a manner very similar to the present, the sons taking life estates only; and the testator declared, that if *Cook Tollett* (the son) should happen to die without issue living at his death, whereby the estate intended for him should go to his eldest brother *George*, then *George* should pay his sister, the Plaintiff, 2000*l*., which was to be charged on the estate. *Cook Tollett* survived *George*, and died without issue, whereby the estate went over *to the children of George*. It was then argued, that the words "whereby the estate shall come to *George*" must mean to him personally, but Lord *Hardwicke*, after consideration, determined, that they meant his line, and directed the 2000*l*. to be raised.

As to the second objection, that the limitations of the estate are not extended to all the issue which the sons of the grandsons might have; as for instance, to the daughters of the sons of the grandsons; so that the trusts for raising additional portions are limited after an indefinite failure of issue, not inheritable under the limitations, and are void for remoteness, we do not argue, that the words "without issue" mean without issue at the death of the party dying; but that they mean without such issue as would inherit under the prior limitations in the will.

After using the words "without issue," the testator adds explanatory words, shewing what would be the consequence of the failure of such issue; and he, in that way, designates the issue which he intended; he says, that the consequence of the failure of the issue which he intended

(*a*) *Ambler*, 177. 194.

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intended to designate would be, that the survivor of the grandchildren would thereby become entitled to all the manors as well at *Testerton* as *Middleton*. It is consequently evident, that he contemplated such a failure of issue, as would have the effect of carrying over the estate to the other branch. Here, then, is the intention expressed, which the Vice-Chancellor looked for in vain in *Bristow* v. *Boothby*.

If the words were held to mean a general failure of issue, it would be irreconcilable with the scope and intention of the testator expressed by this will; and the testator would be held to have intended to give the extra portions, not in the event of the two estates centering in one stock, but on an event quite independent.

In *Blackborn* v. *Edgley* (*a*), the testator devised freeholds to trustees, in trust, to convey them to *H. E.* for life; with remainder to trustees, to preserve contingent remainders; with remainder to his first and other sons, in tail male; with remainder to his daughters, in tail general; and if *H. E.* should die without issue, then that the premises should be settled on certain persons in fee; and it was then held, that dying without issue must be intended "such issue."

If then, in this case, the failure of issue mean such issue as will prevent the two estates uniting in one stock, the trust for raising portions will be well limited after the prior estates tail; and this case will not be open to the objection which prevailed in *Bristow* v. *Boothby*.

It

(*a*) 1 *P. Wms.* 600.

1837.

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It is then said, that the limitation is void on the ground, that the extra portions are to be raised out of a term of 500 years, which is limited antecedently to an estate tail; that a recovery would not bar the term, and, consequently, would not destroy the trust; but it is evident, that the testator did not intend that the term should be barred, because there were other purposes which the term had to answer, having priority over the estate tail, namely, to raise annuities and the original portions; this distinguishes the present from the other cases. In *Morse* v. *Lord Ormonde*, there was no such previous purpose to answer; and therefore, the term was limited after the estate tail: Lord *Eldon*, it appears in that case, did not advert to the term, for in a note (*a*) to the report it is stated, that Lord *Eldon* "did not, in his judgment, make any express allusion to, or lay any stress on, the limitation of the term of 1000 years to the trustees."

It is assumed by the other side, that because a term is so limited, that it cannot be barred by the tenant in tail, it is void for remoteness; such is not the decision in *Eales* v. *Conn;* nor did the Vice-Chancellor put it on that ground; no authority has been cited to shew, that if the term cannot be barred, that therefore, the charge limited after an estate tail cannot be defeated, or that the term is void.

Mr. *Tinney*, in reply.

The MASTER *of the* ROLLS.

I must allow this demurrer. As to the intention of the testator, the doubt is, what he meant, and whether the additional

(*a*) 1 *Russ.* 407.

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additional sums should be raised so long as any person of the same line remained, or on a general failure of issue. The strong inclination of my opinion is, that he meant such issue as he had described in the former limitations; but, whether so or not, he has directed the sums to be raised on failure of that issue. It might be at a very remote period, and there are no means by which the charges, in this case, could be barred; they depend on a term, and that term is precedent to the estates tail, so that after a recovery, there would remain a term and and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed. It appears to me, on that ground, that the demurrer must be allowed.

Demurrer allowed.

1838.
March 29.

COSTERTON *v.* COSTERTON.

CLARKE *v.* WENN.

A suit was instituted against the representatives of a testator, in respect of a breach of trust; and a decree was afterwards made in a creditors' suit against the same representatives, and an account of the debts &c. was directed to be taken. The Plaintiff in the first suit established his claim, so far as he could, in the creditor's suit, and afterwards brought on the first suit for hearing, when, there appearing a deficiency of assets, he waived further relief, and took the securities on which the trust fund had been improperly invested: Held, that the Plaintiff in the first suit was entitled to his costs out of the assets in the second.

THE first suit was instituted on the 4th of *December* 1834, to make *Charles Costerton* and the representatives of *James Wenn*, deceased, the trustees of a marriage settlement, responsible for certain breaches of trust in respect of the trust monies.

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The second was a creditor's suit, instituted on the 30th of *December* 1834, by the creditors of the same *James Wenn*, for the usual accounts, and administration of his real and personal estate. It came on as a consent cause, on the 1st of *May* 1835, when the usual accounts were directed to be taken; and, amongst them, the Master was directed to take an account of the debts of the testator.

The Plaintiffs in the first suit carried in their claim in the second suit; and the Master, by his report, dated in *June* 1837, certified, that a debt of 2736*l.* was due from *James Wenn* deceased to the trustees of the settlement, being part of certain trust monies received by the testator and applied to his own use; and he found that in addition to such sums, the said testator also invested other parts of such trust monies in certain securities, which, it was alleged, were, or might be insufficient; and a suit was then pending in this Court touching such trust funds, and the alleged misapplication thereof by the said testator.

The Plaintiffs afterwards, in *March* 1838, brought the first suit to a hearing, when they obtained a decree against the estate of the testator, *James Wenn*, for the aforesaid sum of 2736*l.*, together with costs; "but inasmuch as the Plaintiffs, by their counsel, waived any account or inquiries in respect of the several other breaches of trust, by the Plaintiffs alleged to have been committed by the testator, *James Wenn*, by reason of the smallness of the assets of the said testator, *James Wenn*, and the costs and expenses which would be incurred in prosecuting such accounts and inquiries," no decree was made by the Court in respect of the other breaches of trust.

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The case having come on, upon the petition of the Plaintiffs in the first suit, presented in both, the principal question argued was, as to the costs of the first suit.

Mr. *Pemberton* and Mr. *Girdlestone*, for the Plaintiffs in the first suit, relied on the case of *Illingworth* v. *Nelson*. (*a*)

Mr.

(*a*) ILLINGWORTH *v.* NELSON.

SWAN *v.* NELSON.

M. R. 1825. *June* 17. V. C. 1828. *July* 15. L. C. 1828. *Nov.* 21. M. R. 1830. *Feb.* 19.

There were two suits brought against the representatives of a testator, one a creditor's suit, and the other for a breach of trust. The accounts were taken in the first suit, and the debts, &c. ascertained; but, the assets appeared insufficient to pay the debts in full, in the event of the claims of the Plaintiff in the second suit being substantiated. The second cause not having been heard, the Court ordered a part of the assets to be set apart to answer the costs in the second suit, and a proportionate part of the assets to be reserved to answer the claims of the Plaintiff in the second suit, and the residue to be apportioned and paid to the creditors in the first suit.

THE first of these causes, namely, *Illingworth* v. *Nelson*, was instituted in 1824 against the personal representatives of *Caley Illingworth* and of another person, both deceased, who had been the trustees of a marriage settlement, to make them responsible for an alleged breach of trust, in respect of two sums amounting to 2800*l*.

The second suit of *Swan* v. *Nelson* was a common creditor's suit, commenced in *June* 1825, against the personal representatives of the same *Caley Illingworth*.

Under an order made in both the causes, dated the 17th of *June* 1825, the representatives of *Caley Illingworth* paid into Court, in trust, in the two causes, the balance of the personal estate. On the 27th of *June* 1825, the usual decree in a creditor's suit was made in the second cause, and it was referred to the Master, to take an account of the personal estate, debts, &c., of the testator.

The Master found the amount of the debts of the testator, but did not include therein the debt claimed by the Plaintiffs in the first suit, which had not then been substantiated; he also ascertained the amount of the assets applicable to the payment of those debts.

On the 15th of *July* 1828, the Vice-Chancellor made an order for the taxation and payment of the costs in the second suit, and for the payment, out of the funds in Court, of the several debts found due by the Master's Report in the second suit.

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Mr. *Barber* and Mr. *Blunt*, *contrà*, contended, that the Plaintiffs in the first suit, having previously substantiated the same demand against the assets in the second suit, were not justified in prosecuting the first suit; and, secondly, that the losses and costs arising from the joint breach of trust ought not to be wholly thrown upon the assets of *James Wenn*, but ought to be partially borne by *Charles Costerton*, the co-trustee.

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The Plaintiffs in the first cause, who had not at that time obtained a decree, appealed from this order, which would have disposed of the principal part of the funds, and would have left little, if any thing, for the payment of their demand, if they succeeded in the first suit.

The appeal was heard before Lord *Lyndhurst*, on the 21st of *November* 1828, who ordered that 300*l.*, part of the assets, should be laid out, on trust, in the two causes, to an account "of the costs of *Illingworth* v. *Nelson*," and to accumulate and form a fund to answer the costs of the said cause, according to the decree to be made thereon; and the other funds were directed, after payment of certain costs, to be divided into two parts, according to the proportion, which the claim of the Plaintiffs in the cause of *Illingworth* v. *Nelson*, bore to the amount of the debts proved in the cause of *Swan* v. *Nelson*; and the sum allotted to the creditors, was directed to be apportioned and paid amongst them, and the other part was to be accumulated.

The Master accordingly divided the fund; and the whole assets, amounting to 1760*l.*, he apportioned the sum of 532*l.* to the creditors, in respect of their demands in the second suit, amounting to 1213*l.*; and he apportioned 1228*l.* to answer the claim of 2800*l.* of the Plaintiffs in the first suit.

On the 19th of *February* 1830, the first cause came on for hearing, before the Master of the Rolls. Mr. *Bickersteth* and Mr. *Lovat*, for the Plaintiffs; and Mr. *Pemberton* and Mr. *Ching*, for the Defendants; when the Plaintiffs in the first suit obtained a decree. And it was stated, that a subsequent order was made for appropriating to the Plaintiffs in the first suit, the fund set apart to answer their claims.

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The MASTER *of the* ROLLS decided, that the Plaintiffs in the first suit were entitled to rank as specialty creditors against the assets of the testator, and to receive payment in the second suit; and he directed the costs of the Plaintiffs in the first suit, and of all parties to the petition, to be paid out of the funds in the second suit; and he declared the Plaintiffs in the first suit entitled to the benefit of the several securities, upon which it appeared, the remainder of the trust funds was invested. (*a*)

(*a*) The Plaintiff in the second suit appealed from this order, which was heard by the Lord Chancellor on the 4th of *August* 1838, when his Lordship dismissed the appeal with costs, and approved of the decision in *Illingworth* v. *Nelson*.

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1837. *Dec.* 18. 23.

A testator devised an estate in *Denbighshire*, to his son *A.*, for life, with remainder to *B.*, for life, &c. and declared, that if *A.* should not within eighteen months after he should become entitled to certain other estates, in *Carnarvon*, sell them, and pay the charges on the first estate, then the devise to him should cease. *A.* became entitled to the second mentioned estates in 1814, and, under an agreement with *B.*, he did not sell them, but incurred a forfeiture, *B.* undertaking to re-grant the estates, during their joint lives, at a rent of 350*l.* This was effected, and *A.* remained in possession. The mother of *A.* and *B.*, in 1818, by her will, gave certain benefits to *B.* and his sisters, and directed, that whenever either of them should come into possession of the estates in *Denbigh*, his interest in her property should cease. After the death of the mother, it was held, that *B.* had come into possession within the meaning of her will, and that his interest in his mother's property had ceased.

THE facts of this case, so far as material, were as follows: — *Robert Watkin Wynne*, by his will, dated in 1806, devised his family estates, in *Denbighshire*, called the *Garthmeilio* or *Upper Country Estates*, to trustees, for a term of 500 years, for raising such a sum of money as might be wanting in aid of his personal estate, and of another estate, devised to be sold for the payment

payment and discharge of his debts, funeral expenses and legacies; and subject thereto, he devised the family estates to his son *John*, for life; remainder to the use of his son *Watkin* (since deceased), for life; with remainder to the use of his son *Charles*, for life; with remainder to the use of his daughters, *Ann* and *Emma*, and the survivor of them, during their lives, with divers remainders over; and after reciting, that his, the testator's mother, was seized of certain estates in the county of *Carnarvon*, for her life, with remainder to him, the testator, in tail, and that, in the event of his mother surviving him, the same would go and belong to his son *John*, as tenant in tail; the testator declared it to be his wish, that in case his same son should survive him, and become entitled, in possession, to the last-mentioned estate, he should, as soon after as he should so come into possession as conveniently might be, sell and dispose of the same; and with the produce thereof, pay and discharge all the incumbrances affecting the *Garthmeilio* estates; and in case his said son *John* should not, within eighteen months after he should so become entitled to the *Carnarvonshire* estate, sell the same, and pay the produce thereof in discharge of the incumbrances upon the *Garthmeilio* or *Upper Country* estates, then that the devise of the *Garthmeilio* or *Upper Country* estates, to him the said *John Wynne*, for life, as aforesaid, should cease and determine as if he were dead.

The testator died in 1806, and on the death of the testator's mother in 1814, *John Wynne*, the son, became entitled to the *Carnarvonshire* estates, as tenant in tail, of which he afterwards suffered a recovery, and thereby acquired the fee-simple; he did not, however, sell the same in compliance with the wish expressed in the will of the testator, but by arrangement with his brother *Charles*,

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Charles, who was next in remainder, he incurred a forfeiture as after stated.

Ann Sobieski Wynne, the testatrix, and the widow of the testator, by her will, dated the 21st of *August* 1818, after bequeathing certain legacies, and directing the conversion and investment of her property, proceeded as follows: — "The dividends or interest arising from the said property I will and desire my said trustee to pay as follows: 10*l.* per annum to my son *Julius Wynne*; and the rest of the income from the said fund to be equally divided between my three children hereinafter mentioned, my daughter *Ann Ogilvie* (the wife of *James Ogilvie*), my daughter *Emma Wynne* and my son *Charles Wynne*, with this proviso, *that whenever and as any one of the aforesaid named daughters and son, shall come into possession of the family property, such individual share of interest money shall devolve to the remaining annuitant or annuitants, during their respective lives*, except in the event of my daughter *Emma*'s marriage; if that should happen, I will and desire, that on such marriage, my trustee shall pay to her the sum of 1000*l.* clear of all deductions, and the remainder of the aforesaid funded property, whatsoever it be, I will and desire may be exactly divided; and, after all expenses attending this trust are punctually satisfied, be paid to my daughter *Ann Ogilvie*, and to my son *Charles Wynne*, reserving a sufficient sum, the interest of which, amounting to 10*l.* per annum, my son *Julius* is to be paid, during his natural life, and, at his death, the said principal sum so released, to be paid, in equal shares, between *Ann Ogilvie* and *Charles Wynne*, or their heirs; and I give to my respective children *Ann Ogilvie*, *Emma Wynne* and *Charles Wynne*, the power to bequeath their respective shares of property thus left to them, under the conditions provided by this will."

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By the decree made in this cause, bearing date the 14th of *February* 1829, it was referred to the Master, among other things, to enquire, whether the children of the testatrix (*Ann Sobieski Wynne*), *Ann Ogilvie*, *Emma Wynne* and *Charles Wynne*, or any or either, and which of them had come into the possession of the family property, within the meaning of the said testatrix's will; and the said Master was to be at liberty to state special circumstances.

The Master, to whom the cause was referred, by his report, dated the 16th of *December* 1836, found, that by an indenture of lease, dated the 31st of *January* 1815, made between *Charles Wynne*, of the one part, and *John Wynne*, of the other part; after reciting that *John Wynne*, with a view to fulfil the condition annexed to the family estate, had caused the *Carnarvonshire* estate to be advertised to be sold on the 3d of *January* then instant, and that the said *Charles Wynne*, being next entitled in remainder to the family estates, either upon the decease of *John*, or non-performance of the condition annexed to his estate, had, on the day next before the day of the said intended sale, proposed to the said *John Wynne*, that if he would not sell the *Carnarvonshire* estate, in compliance with the wish of the said testator, and thereby forfeit the estate devised to him in the *Garthmeilio* estate, so as to suffer the said *Charles Wynne* to succeed him, as tenant for life in remainder, under the said will, he, the said *Charles*, would grant unto him, the said *John*, a lease of the same, for their joint lives, at a yearly rent of 350*l.*, subject to the incumbrances; it was witnessed that, in consideration of being let into possession of the *Garthmeilio* estate, he, the said *Charles Wynne*, did lease the same estate to *John*, during their joint lives, at a yearly rent of 350*l.*

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The Master also found, that *Ann Ogilvie*, and *Emma Wynne* had neither of them come into possession of the family property, within the meaning of the said testatrix's will; but as to the said *Charles Wynne*, he submitted to the judgment of the Court, whether, under the circumstances stated, he had come into possession of the said family property, within the meaning of the said testatrix's will.

The cause came on to be heard for further directions on the Master's report, on the 18th of *December*, when

Mr. *Temple* and Mr. *Girdlestone*, for the Plaintiffs, having opened the case, and stated that the Plaintiffs had no interest in the points in dispute,

Mr. *Tinney*, for *Charles Wynne*, objected, that the next of kin of the testatrix were not represented. He said that it might be contended, that the testatrix had died intestate, as to a part of the interest of the funds in question, and that the case, therefore, ought not to be argued in the absence of her next of kin.

23d *Dec.* The cause was accordingly ordered to stand over for a week, in order that the next of kin might be represented; and, this being done, it now came on again to be heard.

After some discussion, it was arranged that the counsel for *Emma Wynne* should commence the argument, and have the benefit of the reply.

Mr. *Pemberton* and Mr. *Bethell*, for *Emma Wynne*, contended, that it was clear that *Charles* had come into possession of the family estate, within the terms of the will of his mother. Although *John* was apparently in possession, yet he was a mere tenant to *Charles*, and the possession

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possession of a tenant is that of the landlord. The facts of a forfeiture having been committed, and of the estate having devolved on *Charles*, being recited in the lease, those facts could not now be disputed by *Charles*. Although the words in the will of Mrs. *Wynne* were in the future, — "if he *shall* come into possession," yet the fact of his being already in possession could make no difference: as, where a legacy is given in the event of a legatee attaining twenty-one, if such legatee had attained that age before the date of the will, still he would be entitled to the legacy. The forfeiture having taken place, the next question was, whether *Emma* and Mrs. *Ogilvie* took life interests, or absolute interests: they contended that they took absolute interests, for it has been holden, that where income is given indefinitely, there the capital is included; *Philipps* v. *Chamberlaine* (*a*), *Page* v. *Leapingwell* (*b*), *Stretch* v. *Watkins* (*c*). Here, indeed, a power of bequeathing their shares is given to the legatees; but there are many cases which shew that this does not reduce an absolute gift to a life interest, but is either void, or else is merely a power superadded to an interest, as a person may be seized in fee of land, and have a power of appointment besides. *Robinson* v. *Dusgale* (*d*), *Maskelyne* v. *Maskelyne* (*e*), *Comber* v. *Graham* (*g*). If *Emma* marries, there can be no doubt that the capital is to be divided immediately: and it cannot be supposed, that that event was intended to do more than alter the amount of the share to be received by each child; that it was intended also to enlarge their interests in their respective shares. The Court must declare that *Charles* has forfeited all right to the testatrix's property, and that it now belongs to *Emma Wynne* and Mrs. *Ogilvie*

(*a*) 4 *Ves.* 51.
(*b*) 18 *Ves.* 463.
(*c*) 1 *Madd.* 253.
(*d*) 2 *Vern.* 181.
(*e*) *Ambl.* 750.
(*g*) 1 *Russ. & Myl.* 450.

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Ogilvie absolutely, in equal shares, subject only to the contingency of *Emma*'s marriage.

Mr. *Prescott White*, for Colonel *Ogilvie* (the husband of *Ann Ogilvie*), followed the same line of argument. He cited *Clark* v. *Lucy* (*a*), *Yarnold* v. *Moorhouse* (*b*), as instances of words of futurity being fulfilled by past events, and *Lewes* v. *Lewes* (*c*). In the latter case, indeed, it was not necessary to decide the point; but it was strongly contended that a legacy, directed to be forfeited in case of alienation, was forfeited by an alienation previous to the date of the will. In support of the position, that an indefinite gift of income carried the capital, he cited *Adamson* v. *Armitage* (*d*), *Clough* v. *Wynne* (*e*), and *Haig* v. *Swiney* (*g*): and he relied on *Bull* v. *Kingston* (*h*), as an authority that a power of bequeathing did not reduce an absolute gift to a limited one, even where there was a limitation over, in default of appointment, which did not occur here. He submitted that Mrs. *Ogilvie* had obtained an absolute indefeasible interest in one moiety of the testatrix's property, which ought to be at once paid to her husband, subject to her equitable right to a settlement: and that she would also be entitled, in the event of *Emma*'s marriage, to so much of *Emma*'s share as exceeded 1000*l.*

Mr. *Skirrow*, and Mr. *Munro*, for Mrs. *Ogilvie*, who appeared separately from her husband.

This case is governed by the distinction taken in the books between a condition impossible at the date of the grant, and one which becomes impossible afterwards; *Co. Litt.*

(*a*) 5 *Vin. Abr.* 87.
(*b*) 1 *Russ. & My.* 364.
(*c*) 6 *Sim.* 504., affirmed on appeal, 21st *January* 1835.
(*d*) 19 *Ves.* 416.
(*e*) 2 *Madd.* 188.
(*g*) 1 *Sim. & St.* 487.
(*h*) 1 *Mer.* 314.

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Litt. 206. a. In the latter case, the party liable to the condition is discharged from it:—in the former, if the condition be precedent, the whole gift is void. Here, there was a precedent condition that *Charles* should not take the family estate:—but this was impossible at the date of the will, for he was already in possession of it: the gift, therefore, to him, which was founded on that condition, was void. *Parry* v. *Boodle* (*a*), shews that a condition may operate, though not literally fulfilled. That was a bequest to *C. D.*, but if he should be dead, to the Plaintiffs. *C. D.* was not then dead, but he died before the testator, and the Plaintiffs were held entitled, though it seems admitted that the testator had in view, a death at the time of making the will. In like manner, in gifts to issue, *procreatis* and *procreandis* are *convertible* terms: unborn children may take under the former word, and those already born under the latter.

Charles's interest being forfeited, *Emma* and *Anne* are alone entitled; and they take absolute *interests*, subject only to the variations in case of *Emma*'s marriage; for the gift is not restricted to their lives; and (in addition to the cases which have been cited), *Hixon* v. *Oliver* (*b*), and *Elton* v. *Shephard* (*c*), shew that a power of appointment has no restrictive operation.

Mr. *Temple*, for the next of kin of the testatrix.

Obscure as this will must be admitted to be, it gives no room for contending, that the legatees take any thing more than life interests, with powers of appointment by will: this at least must be the case, if *Emma* does not marry; and even if she does, there is strong ground for contending, either that they only take the same interests,

(*a*) 1 *Cox*, 183.
(*b*) 13 *Ves.* 108.
(*c*) 1 *Bro. C. C.* 532.

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interests, in the altered amounts then allotted to them, or that the bequest is to be rejected for uncertainty; for it makes no provision for the event of the forfeiture happening, and yet it cannot be supposed to be uninfluenced by that event. The residue, after payment of 1000*l.* to *Emma*, is to be *equally divided*. But between whom, if (as has happened) the family estate shall have devolved on *Charles?* At all events, if *Emma* remains unmarried, this property must belong to the testatrix's next of kin, subject only to the life-interests of *Emma* and *Anne* in the whole fund, and to their right of bequeathing two thirds of it: for *Charles* has clearly forfeited his power of appointment, and his third share, therefore, cannot now be bequeathed by any one.

Mr. *Tinney*, for *Charles Wynne*. The effect of this will is, to give to each child a life-estate subject to forfeiture, and a power of appointment not liable to forfeiture; and to provide, in the event of *Emma*'s marriage, for an immediate division of the capital, the shares in which are also exempt from forfeiture. What has been called forfeiture, is however, rather a limitation over, and is to be considered according to the rules affecting conditional limitations. The only question is, whether *Charles Wynne* has done any act, whereby the limitation over of his life-interest to his sister has taken effect.

Mrs. *Wynne*, the testatrix, was executrix and trustee of the will of her husband, by which the family estate, as it is called, was devised to *John Wynne*, with a gift over to *Charles*, unless *John* sold his grandmother's estate within eighteen months after it devolved upon him. The proceeds of this sale were to be applied in discharge of debts to which Mrs. *Wynne*, as executrix and trustee, was liable. In *January* 1814, the grandmother's

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mother's estate devolved on *John*: the sale ought to have taken place, at the latest, on the 20th of *July* 1815. The date of Mrs. *Wynne*'s will is the 21st of *August* 1818. Is it possible to suppose that she was then ignorant of the real state of things? Was she not aware of her mother-in-law's death? Was she not aware that the debts which *John* ought to have paid three years before were still unpaid? Was she not aware that he retained possession of the estate which he ought to have sold? And knowing these things, and knowing, as she must have done, the contents of her husband's will, could she have been ignorant that the family estate had long since devolved *in law* upon *Charles?* What then can be the meaning, of her speaking of *Charles*'s coming into possession of the family estate as a future event, unless we suppose her to have regarded that devolution only to *Charles*, which would take place on *John*'s death; and which would be a real devolution, not the mere nominal devolution which had taken place, and which had put *Charles* in possession of an income of 350*l.* out of an estate worth 5000*l.* a year. The cases, therefore, which have been adduced to shew that *procreatis* and *procreandis* are synonymous terms, do not apply, since they rest on the ground of the testator's supposed intention; whereas here, we have the strongest reason to suppose, the testatrix's intention conformable to the strict interpretation of the words she has used.

[*The* MASTER *of the* ROLLS. You rest your case on Mrs. *Wynne*'s supposed knowledge of the lease from *Charles* to *John*. Now I have no proof of this: and though, *primâ facie*, the Court will presume a trustee to be cognizant of facts relating to his trust, yet that presumption will not arise, where such cognizance would make him privy to a fraud.]

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It is submitted that this transaction was not a fraud. True it is, that had *John* sold his grandmother's estate, the whole family would have been benefited by it; but the testator had not so arranged the alternative, as to make the family benefit by that also. The penalty was given wholly to *Charles;* and unless he was a trustee of that penalty, which cannot be maintained, he had a right to decline enforcing it, and to deal with it as he pleased. The Court, therefore, is not barred from presuming, that the testatrix knew of the arrangement between the brothers, as in point of fact she must have done; and if her knowledge of that fact be conceded, the construction we contend for, cannot be avoided.

If however the limitation over has taken effect, its operation extends only to *Charles*'s life interest. It is said, indeed, that these bequests to the children are absolute gifts of the capital, because the income is given indefinitely, and because an absolute gift is not reduced in extent by the addition of a power of appointment. But here the income is not given indefinitely, but clearly circumscribed, by various expressions, within the compass of a life estate. It is undeniable that *Julius* takes only a life interest in his annuity of 10*l.*, which equally, at first, appears to be bequeathed indefinitely, and the same construction must, by analogy, be applied to the gifts to the other children. *Charles*, therefore, as well as the others, took a life interest only, with a power of appointment, except in the event of *Emma*'s marriage: and it is his life interest alone which is subject to the limitation over; and not indeed even the whole of his life interest: his share of the income is to "devolve to the remaining annuitant or annuitants during *their respective lives*" only: so that, on either of the sisters dying, her moiety of the forfeited income will return to *Charles*. The power of appointment is indeed given "under

"under the conditions provided by this will:" but this plainly refers to the immediate distribution directed on *Emma*'s marriage; and that the share to be taken by *Charles*, under that distribution, was not subject to any limitation over, appears from the fact, that such a limitation over might have the effect of delaying a division, which it was the evident desire of the testatrix to make immediately consequent on the marriage. On the whole, therefore, we ask a declaration, that the limitation over is confined to *Charles*'s life interest, and that such limitation over has not yet taken effect.

Mr. *Bethell*, in reply. First, as to the extent of interest affected by the limitation over. It is immaterial, for this purpose, whether *Charles* took an absolute interest, or a life estate with a power of bequeathing. All that he took he forfeited by coming into possession of the family estate. His power is expressly given to him subject to the conditions of the will, one of which conditions is, that the legatee is not to be in possession of that estate. The gift in the event of *Emma*'s marriage is so connected, in grammatical construction, with the preceding clause, as to be clearly affected by the same condition. And as to the words "during their respective lives," whatever their meaning may be, they have no bearing on this question, since they point to the life of the recipient, not that of the forfeiting party.

But in truth, the case is not yet ripe for a complete decision on this point. For even if the legatees do take absolute interests, their shares cannot be paid to them till it is known whether *Emma* does, or does not marry; and the Court is not in the habit of declaring rights in anticipation. It may indeed be suggested, that the testatrix is speaking only, of the event of *Emma*'s marriage in her own lifetime, and that, as it has not

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happened, the whole proviso is utterly at an end. But unless the Court adopts that construction, it can only declare at present, who are entitled to receive the interest, and direct payment accordingly.

Secondly, as to whether the forfeiture has taken effect. The lease from *Charles* to *John* recites that *Charles* was in possession: he is estopped, therefore, from denying this fact; and he rests his case on the assertion, that the testatrix was aware of *this* possession, and that her will referred only to the future possession which he would obtain on *John*'s death. This assertion is backed by no proof, but the Court is called on to presume the truth of it, from the situation in which the testatrix stood as executrix of her husband's will. This situation affords, no doubt, a presumption that she had read her husband's will; but it affords none that the contents of it, and all facts connected with those contents, were present to her mind at the time when she was making her own will; and yet this is the case which *Charles* must make out, in order to give her words that peculiar sense which he would attach to them. The lease was in its nature a secret transaction: *John* was in possession of the estate before the execution of it, and he continued, to all outward appearance, in the same possession afterwards. Supposing that the testatrix must have known that a forfeiture had occurred, it does not follow that she knew that *Charles* had enforced the penalty; and her will speaks, not of a future *title* accruing, but of a future *possession*. In fact, what was passing in her mind at the date of her will is not a subject of presumption, for it is not a subject of inquiry. How could it be referred to a Master to ascertain, by extrinsic evidence, what facts were present to the testatrix's recollection at the date of her will? And what could not be referred to the Master cannot be determined

mined by the Court. The words, therefore, must be taken in their natural sense; and, according to that sense, a forfeiture has occurred.

The MASTER *of the* ROLLS. This is one of those obscure and perplexed wills to which it is difficult to attach any consistent and rational meaning: at the same time it does appear to me, on the result of the discussion, which has been conducted, no doubt, with great ability, that I can come to a conclusion respecting the meaning of this testatrix's will, which is consistent with itself at least, though, perhaps, not to be accounted for, in all respects, in the way that has been suggested. This lady, it seems, desired all her property to be converted into money, and after directing the payment thereout of her funeral expenses and debts, and certain legacies, she proceeds as follows: — "All the residue," &c.

The first question that is made here is, as to the interest which each of the children took: is it a life interest, or is it an absolute interest? The counsel for *Emma Wynne* and Mrs. *Ogilvie*, arguing upon this point, said, this is an absolute interest, because it is a gift of interest or dividends indefinitely; and that gift will not be altered by the last clause in the will, which gives a power of disposition by will. However, it proceeds with this proviso: [His Lordship stated it.] She treats them there as "remaining annuitants;" that is, after taking away *Charles*, who is there supposed to have come into the possession of the family property, if he was the first to do so, which, by the limitations in the former will, he must have been. She considers them as annuitants, therefore, and they may have been perpetual annuitants; but we come afterwards to another part of the will, and we find, notwithstanding the indefinite gift to *Julius*, she clearly intended

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Julius was to have no more than a life interest, "reserving a sufficient sum, the interest of which, amounting to 10*l.* per annum, my son *Julius* is to be paid during his natural life." And taking all these parts of the will together, the indefinite gift of interest, the treatment of such gifts as annuities, and the express direction that *Julius* is only to have a life interest, and a proviso, that they are to have a power of disposition by will, I think altogether the conclusion is, that she meant them only to have a life interest in this estate.

But, then there remains another question, as to what is to be done when *Emma* marries. I may take that next. She says, "in the event of my daughter *Emma*'s marriage," &c. Upon the construction of that clause, it appears to me, if *Emma Wynne* should marry, that the 1000*l.* being paid to her, the remaining capital will have to be equally divided between *Anne* and *Charles*.

Then there remains the question with respect to the forfeiture, as it is called; it is, however, as Mr. *Tinney* has accurately called it, no forfeiture, but a limitation over, and must be treated and considered as a limitation over in a certain event. This is the proviso: [His Lordship stated it.] Now it is not doubted, but that under certain circumstances, this might have operated, and would have operated, if *John Wynne* had observed the will, and brought the estate to sale for the purpose of relieving the incumbrances; and that *Charles Wynne* had afterwards, after the death of the testatrix, come into possession of the property under the limitations of the will. I think it is not doubted that, on that event happening, the limitation over would have taken effect.

The question which remains then is, whether it has taken effect in the events which have happened; with respect

respect to which the facts of the case appear to be as follows: [His Lordship here stated them.] The testator's mother, who was the tenant for life of the *Carnarvon* estate, died on the 20th of *January* 1814. The time within which *John* ought to have sold, pursuant to the directions of the will, expired on the 20th of *July* 1815, and, in the meantime, it appears to have been the intention of *John* to sell those estates for the purposes mentioned in the will; for it is stated by a lease of the 31st of *January* 1815, which is set forth in the Master's report, that it was there recited, "that *John Wynne*, with a view to fulfil the conditions annexed to his estate," &c. In consequence, as it would appear, of this proposition made by *Charles* to *John*, *John* did not sell those estates; the effect of which was, that the limitation over, provided by the will of the testator, *Robert Watkin Wynne*, took effect; and, in anticipation of the time within which *John* was allowed to do it, and on the 31st of *January* 1815, the lease, which was thus proposed, was executed. By that lease, *John* became entitled to the possession of the estate during the joint lives of himself and *Charles*, he paying to *Charles* an annual rent of 350*l*. Under this arrangement, which wholly disappointed the intention of the testator in this respect, *John* continued in possession of the *Garthmeilio* estates. How far this arrangement between *John* and *Charles* was known to anybody but themselves, is what I have no means of knowing, consequently have no right to conjecture. What does appear is, that after the estate had been advertised for sale, *Charles* made this proposition, and that proposition having been accepted by *John*, *John* continued to be the ostensible owner, and the actual possessor of the estate.

Ann Sobieski Wynne, the testatrix in the present case, was one of the persons who were appointed trustees and executors

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executors of the will of the testator, her husband. Generally a person who has undertaken to perform a trust or duty must be presumed to know all those things which ought to come to his knowledge in the due execution of his trust or the due performance of his duty; and therefore, *primâ facie*, and in the absence of any circumstances whatever to rebut that presumption, it certainly would seem, that Mrs. *Wynne* ought to have known this fact — that the settled estates were not relieved from the incumbrances, by the means which the testator had pointed out, — by the sale of the *Carnarvon* estate; but there is nothing, that I am aware of, to shew, or from which it can at all be presumed, that she was aware of the arrangement between *Charles* and *John*. I find nothing from which that knowledge can be traced to her; I find there was a public fact which she might have known or not, the advertisement for sale, which would have been in strict compliance with the will; I cannot know it, therefore I do not rely upon it: but her son *John* was in possession of the estate. There is nothing to shew she was acquainted with the transaction between *John* and *Charles;* there is nothing from which I can reasonably impute to her a desire to defeat the intention of the testator; and I do not think, under these circumstances, I am at liberty to presume, that she was taking an active part in committing what, if she did take an active part in doing, would have been a breach of trust. The question is, not whether she was consenting to it, or whether she was chargeable with a breach of trust; that has nothing to do with this case; but it is a matter seriously to be considered, when we are weighing presumptions, for the purpose of imputing to her certain intentions, from the use of certain expressions employed in her will. I confess I do not find any thing here, upon which I ought to conclude, that she was fully aware of the situation in which things stood

stood at the time of her death; and then, if that be correct, there remains this only question, whether, supposing her not to have been aware of this at all, *Charles* is not to be affected by this proviso, merely because the words express something future. I think that *Charles* is to be affected by it, notwithstanding those words may be considered to refer to a fact which is future. They refer to a fact which is future; why? Because she was not aware that the fact would not be future; she was not, for, under the circumstances, I am under the necessity of concluding she was not, aware that it had already happened.

I am therefore of opinion, that the limitation in this case did take effect under the circumstances stated, and it is a limitation which takes effect only as regards the life interest of *Charles*.

What appears to me, upon the whole, to be the result of this will is, that this is a gift of the dividends and interest to the three children, to be equally divided between them, for their respective lives, with a power of appointment to each of them by will; with this proviso, "that if any of them comes into possession of the family property, the life interest of such one shall go to the other or others of them, for their life or lives;" and this further proviso, that if *Emma* shall marry, she is to receive 1000*l.* out of the capital, and the remainder of the capital is to be equally divided between *Charles* and *Anne;* and that, under the circumstances, *Charles* is to be considered as having come into possession of the family property in such a way as to give effect to the limitation over.

Extract

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Extract from Decretal Order.

"Declare, that the Defendant, *Charles Wynne*, having, within the intent and meaning of the said testatrix's will, come into the possession of the property designated in the testatrix's will as "the family property," the Defendants, *Anne Ogilvie* and *Emma Wynne*, became, from the 8th day of *December* 1818 (the day of the decease of the said testatrix,) and are, (subject to such declaration in the event of the marriage of the said *Emma Wynne*, as is hereinafter contained,) entitled, in equal moieties, to the clear income of all the residue of the said testatrix's personal estate, for their respective lives, with power for each of them, and also for the Defendant *Charles Wynne* (subject to such application of the income as aforesaid,) to dispose of one third of the principal of such clear residue by their respective wills. And declare, that in the event of the marriage of the Defendant, *Emma Wynne*, she will be entitled to receive the sum of 1000*l.* in lieu of her share of the principal and interest in the residue of the personal estate of the said testatrix: and that, in the event of the marriage of the Defendant, *Emma Wynne*, and after she shall have received the sum of 1000*l.* out of the principal of such residuary personal estate, the remaining principal of such residuary personal estate will belong absolutely to the Defendants, *Charles Wynne* and *Anne Ogilvie*."

AN

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A gift between grandchildren living at the testator's death, to be divided between them on the death of the survivor of three persons, with a gift over to the survivors, in case of the death of any before he should be entitled to receive his share, and to be paid at the same time, and in the same manner, as before mentioned touching the original share. The gift over held to apply to the accruing as well as to the original share. *Eyre* v. *Marsden.*

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ACCUMULATION.

1. A testator gave the residue of his property to *R. S.*, the eldest son of *P. S.;* and, failing him, to the next and other sons in succession of *P. S.;* and, failing the male children of *P. S.*, to the legatees named in the residuary clause. And he directed his executors to apply the dividends of his residuary property to the maintenance of *R. S.* during his minority, and of the other sons in succession of *P. S.*, in case of the death of *R. S.* before attaining the age of twenty-one.

R. S. survived the testator, and died an infant, and *P. S.*, who was far advanced in years, had no other son.

The period allowed by the statute for the accumulation of the income of the residue having expired, it was held that the next of

of kin, and not the residuary legatees, were entitled to the income of the residue, until the contingency upon which the residue was given, either to a male child of *P. S.*, or to the legatees named in the residuary clause, should be determined. *M'Donald* v. *Bryce*. Page 276.

2. A testator gave 3000*l.* stock to trustees, in trust to authorise his bankers to receive the dividends, and invest the same from time to time in the purchase of more capital in the same stock, to be accumulated for so many years as *M. J.* should live; and after the death of *M. J.*, in trust, to pay the 3000*l.* stock, with the increased capital and accumulations, to *R. T.* and his issue. And the testator, after disposing of other parts of his property, gave the residue of his personal estate to *R. T.* and his issue. Twenty-one years elapsed from the death of the testator, and *M. J.* was still living.

Held, that the income of the 3000*l.* stock, and accumulations, after the twenty-one years, and until the death of *M. J.*, was undisposed of, and belonged to the residuary legatees. *O'Neill* v. *Lucas*. 313

3. A testator gave certain annuities out of his residuary estate to his three children, "and requested the surplus of the annual income to be applied in accumulation of the capital of his property, for the benefit of his grand-children," and which was to be divided between them after the death of the survivor of the testator's three children. Thirty years elapsed between the death of the testator and of the survivor of his children: Held, that the direction for accumulation, beyond twenty-one years from the testator's death, was void under the first section of the *Thellusson* act, and that the case did not come within the exception of the second section.

Held also, that the void accumulations did not belong to the residuary legatees, but that they were undisposed of.

Held, upon the construction of the terms of the will, that such part of the void accumulations as arose from the real estate belonged to the heir at law, and not to the next of kin.

The *Thellusson* act, which restricts the accumulation of property, does not operate to alter any disposition in a will, except only the direction to accumulate. Striking that direction out, every thing else is left as before; and all the other directions in the will, as to the time of payment, the substitution of interest, or any contingencies, take effect unaltered by the statute. *Eyre* v. *Marsden*. Page 564

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1. A testator, contemplating that a fixed annual income of 250*l.* would arise from the investment of 5000*l.*, which annual income he directed to be distributed by his supervisors in the manner directed by his will, gave to his executors and other persons certain property, and directed them, after his death, to erect a grammar-school for the instruction of five-score scholars; and he ordered six tenements to be built for six almsfolk, and ordained six fellowships and scholarships to be founded in *Caius College*. He then appointed the master and fellows of *Caius College* to be the supervisors of his will, and willed that the master and four senior fellows should perform all that was appointed to be done by the supervisors, and he gave to the master and four senior fellows for their pains, yearly, the sums of money afterwards appointed to them. He then gave particular sums, amounting in the whole to 243*l.* 14*s.* 8*d.* (among which were a sum of 3*l.* to the master, and 30*s.* each to the four senior fellows), and he willed that the remainder of the 250*l.* per annum should be from time to time bestowed in such charitable uses as his executors for their times, and after, his supervisors, should think fit.

The sum of 5000*l.*, given by the will, was invested in land, and the

the rents had increased greatly beyond the 250*l.* originally contemplated by the testator.

Held, that the master and four senior fellows took the remainder of the 250*l.* upon trust for charitable purposes, exclusive of any application of it to their own benefit; and that they were entitled to a proportion of the surplus rents in respect of the gift of the remainder, *pro ratâ*, with the other specified objects of the testator's bounty.

Principles upon which the Court proceeds in the exercise of its jurisdiction over charitable foundations, and in the application of relief, where the funds have for a long period been, without corrupt intention, misapplied by the trustees.

The Court considers not only the terms of the gift, but the circumstances under which the gift was accepted, and the foundation established.

A college is under no obligation to accept an accession to its foundation, or any other trust; but, if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust.

If there are questions upon the original instrument of foundation, and an arrangement be made at the time of acceptance, and it is evidenced either by contemporaneous instruments, or even by constant subsequent usage, which may be considered as evidence of such arrangement, the Court will not disturb it, though, in its own view of the original instrument, that arrangement was in effect not expedient.

Where the founders of charitable institutions have thought fit to appoint colleges to be trustees of their foundations, the Court is not at liberty to interfere with the will of the founder in that respect, upon the notion that, when individuals are trustees, there is a greater personal responsibility.

Where there had been great errors and misapplications of the charitable funds committed by the trustees and their predecessors for two centuries, but no corrupt or improper motive was imputed to them, the Court refused to appoint new trustees; and in consideration of the great accumulation of the charity property, the result of the care and economy of the trustees, and of other circumstances, the Court, notwithstanding the errors which had been committed, allowed to the trustees their costs of the suit out of the funds which had been so accumulated.

The Court directed, that in settling a scheme for the grammar-school, liberty should be given to the Master to approve of a plan for adding instruction in writing and arithmetic to instruction in grammar, and other learning fit to be taught in a grammar-school.

school. *The Attorney-General* v. *Caius College.* Page 150

2. A testator, by his will, dated in the year 1556, devised lands upon condition that, with the rest of the premises, the trustees therein mentioned should cause a free school to be kept in the village of *H.* for evermore, to the intent that the children that should be there brought up should pray for the testator's soul, and for all Christian souls. Held, that the words "free school" ought not to be construed as if they were "free grammar-school," and that the rents and profits of the devised estates were applicable to all elementary instruction. *The Attorney-General* v. *Jackson.* 541

3. It is contrary to the policy of the mortmain acts, and to the usual practice of the Court, to allow money belonging to a charity to be invested in land, even for the purpose of enlarging the charity. *The Attorney-General* v. *Wilson.* 680

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2. The execution of a writ of attachment for costs does not deprive the party issuing it of any lien, or right of set-off he may

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1. *A*. being entitled to a contingent interest in 1000*l*., being a moiety of 2000*l*., part of a sum of 20,000*l*. directed by the will to be invested, and which was accordingly invested in the 3 per cent. consols., advertised it for sale by auction, describing it as a reversion to 1000*l*. principal money payable on a contingency, and part of a sum of 20,000*l*. invested in the 3 per cent. consols. The interest having been put up for sale in pursuance of the advertisement, *B*. became the purchaser; and by an indenture reciting the bequest, the investment of the legacy, and the purchase at the sale, *A*. assigned to *B*. "all that sum of 1000*l*. *sterling*, being one moiety of the legacy or sum of 2000*l*. bequeathed by the will."

Held, that *B*. was entitled to the value of the 1000*l*. in its state of investment. *Lucas* v. *Bond*. Page 136. 496

2. Held, upon the construction of a marriage settlement, that under a limitation "to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit," his executors were not entitled beneficially. *Hames* v. *Hames*. 646

3. Construction of a clause of accruer "in case of any younger son becoming an eldest or only son."

An estate was limited to *A*. for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of *A*.; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. *A*. had two sons, *B*. and *C*., and one daughter; *B*. attained twenty-one, suffered a recovery; whereby he destroyed *C*.'s estate in remainder: *B*. died in 1807, leaving *C*., an infant, to whom he devised the estate, for his life. *A*. died in 1833: Held, that *C*. was not entitled to participate in the portion. *Peacocke* v. *Pares*. 689

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DEVISE.

1. A testator devised his real estates to his first cousin *Thomas Pearce* for life, and after *T. P.*'s decease, he devised and bequeathed all his real and personal estates in trust for such of his relations of the name of *Pearce*, being a male, as *T. P.* should by deed or will appoint; and in default of such appointment, for such of his relations of the name of *Pearce*, being a male, as *T. P.* should approve of or adopt, if he should be living at the death of *T. P.*, and his heirs, executors, &c. And in case *T. P.* should not adopt any such male relation, or no such male relation should be living at the death of *T. P.*, then to the next and nearest relation, or nearest of kin of him, the testator, of the name of *Pearce*, being a male; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever.

The testator had a brother, *Z. P.*, who had gone to sea, and had not been heard of for many years; and, supposing *Z. P.* to have died without issue, the nearest relation of the testator, answering the description in the ultimate limitation at his decease, was the tenant for life, *T. P.* and next to him, *R. P.*, the Plaintiff.

T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will.

Held, that *T. P.* took under the ultimate limitation. *Pearce* v. *Vincent.* Page 230

2. A testatrix devised to trustees and their heirs, her copyhold dwelling-house, garden, and ground, together with the furniture and effects therein; and also the ten cottages, and two new cottages built by her, with their appurtenances at *L.*, upon trust, to pay the rents of the said hereditaments to her niece *S. S.*, the wife of *G. S.*, or to permit and suffer her to use and occupy the said hereditaments during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to *G. S.*, for his life, and after his decease, to stand possessed of the said hereditaments, in trust, for such of the testatrix's nephews and nieces, or grand nephews and grand nieces, as *S. S.* should appoint; and in default of appointment, upon trust to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her residuary personal estate.

Held, that the furniture and

effects did not pass to *S. S.*, but belonged to the residuary legatees.

The testatrix gave certain freehold and leasehold premises to trustees, in trust after the decease of *M. I.*, to dispose of and divide the same unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit.

Held, that this was a good devise to the persons to whom it was ascertained that the testator had disposed of her business in her lifetime.

In the residuary clause, "and" was read "or," to effectuate the plain intention of the testatrix.

E. I. indorsed a promissory note for 2000*l.*, and sent it to *S. S.* in a letter, whereby she gave the same to *S. S.*, for her sole use and benefit, for the express purpose of enabling her to present to either branch of her family any portion of the interest or principal thereon, as she might consider most prudent; and in the event of the death of *S. S.*, by that bequest she empowered her to dispose of the said sum of 2000*l.* by will or deed, to those or either branch of the family she might consider most deserving thereof.

Held, that this letter created a trust, the objects of which were too undefined to enable the Court to execute it, and that the 2000*l.* formed part of the testatrix's general personal estate. *Stubbs* v. *Sargon.* Page 255

3. Devise and bequest of freehold, leasehold, copyhold, and 1000*l.* stock, to *A. B.* and *C.*, *tenendum*, the said last-mentioned freehold and leasehold messuages, tenements, estates and premises, and the 1000*l.* upon trust, for *A.*: Held that *A.* was not interested in the copyholds, which descended to the customary heir.

A testator gave real and personal estate to his daughter *A.*, and to two other persons, upon trust, to permit *A.* to receive the rents and interest for life, for her separate use, and after her decease, in trust, to convey to her heirs, executors, &c.: but, in case *A.* should marry, and have no children, then the property to belong to *D.*; or in case of his decease before *A.*, then to his children: Held, that *A.* took an absolute equitable estate, with an executory gift over, to *D.* and his children; and *D.* having died in the lifetime of *A.*, leaving no children: Held, that *A.* was absolutely entitled to the property. *Jackson* v. *Noble.* 590

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An assignment of "all and singular the legacies, debts, monies, estate, and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which *J. H.*, in right of his wife or otherwise, was possessed," will not pass a claim of the assignor's wife to dower out of the estates of her former husband. *Brown* v. *Meredith.* Page 527

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See DEVISE, 3.
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A testator devised his freehold, customary freehold, copyhold, and leasehold estates for the benefit of his seven children; and he gave his remaining personal estate to *A.*, exonerated from his debts; and he declared that his freehold, customary freehold, and copyhold estates, should be the primary fund, and that his leaseholds should be the secondary fund for the payment of his debts. *Joseph*, one of the children, died in the testator's lifetime, whereby his share lapsed: Held, as between the heir at law and the next of kin of *Joseph*, and the residuary devisees and legatee under the will of the testator, that the share intended for *Joseph* of the freehold, copyhold, and leasehold estate, was to be applied in the same order and manner, and to the same extent as if *Joseph* had survived, and that the heir and next of kin of *Joseph* were respectively entitled to what remained after such application. *Fisher* v. *Fisher.* 610

FEME COVERT.

A bond, and all sums of money recoverable in respect thereof, were assigned to trustees, in trust for such intents and purposes, and such person or persons as *E. P.*, a married woman, should direct or appoint; and, in default of appointment, for her separate use. *E. P.* afterwards appointed her interest in the bond to certain persons, in order to indemnify them in case they should not be able to recover the whole of a sum appropriated by her husband, who was their solicitor, and for no other consideration appearing upon the deed.

Held, that this was an executed trust, to which, though without consideration, the Court would give effect; and that the appointees were entitled, as representing *E. P.*'s interest in the bond, to file a supplemental bill to have the benefit of the proceedings in a suit instituted for the purpose of having that interest ascertained and declared, and which had become defective by the bankruptcy of *E. P.*'s husband. *Collinson* v. *Pattrick.*

Page 123

FORFEITURE.

1. By a marriage settlement, the property of the intended wife was vested in trustees, on trust, as to the real estate, to pay the rents to the intended wife for her life; and, after her decease, to pay the same to *R. S.*, the intended husband, until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of an act for the relief of insolvent debtors, or he should sell, alien, charge, or incumber the rents and profits by way of anticipation, or attempt or agree so to do, or should die, which ever of the said events should first happen; and from and after the happening of any one of the said events, upon trust for the children of the marriage; and in default of issue of the marriage, or of issue of the intended wife, over.

The marriage took effect, and there was no issue of the marriage. The husband, *R. S.*, survived his wife, and made several attempts in his lifetime to raise money by sale or mortgage of the property comprised in the settlement, but was prevented from effecting such sale or charge by reason of the language of the settlement:

Held, that a person, entitled to an interest in property, subject to such a limitation over, may make inquiries, and take advice whether he may sell or not, and do acts indicative of his wishes on the subject, without giving effect to the limitation over. *Jones* v. *Wyse.*

Page 285

2. A testator devised an estate in *Denbighshire*, to his son *A.* for life, with remainder to *B.* for life, &c., and declared, that if *A.* should not,

not, within eighteen months after he should become entitled to certain other estates in *Carnarvon*, sell them, and pay the charges on the first estate, then the devise to him should cease. *A.* became entitled to the second mentioned estates in 1814; and, under an agreement with *B.*, he did not sell them, but incurred a forfeiture, *B.* undertaking to re-grant the estates, during their joint lives, at a rent of 350*l.* This was effected, and *A.* remained in possession. The mother of *A.* and *B.*, in 1818, by her will, gave certain benefits to *B.* and his sisters, and directed, that whenever either of them should come into possession of the estates in *Denbigh*, his interest in her property should cease. After the death of the mother, it was held, that *B.* had come into possession within the meaning of her will, and that his interest in his mother's property had ceased. *Wynne* v. *Wynne.* Page 778

3. Held, that a bequest, subject to a clause of forfeiture, in case the legatee should mortgage, charge, sell, or expose to sale, assign, or encumber, was not forfeited by the bankruptcy of the legatee. *Whitfield* v. *Prickett.* 608

FREE SCHOOL.

See CHARITY, 2.

GRAMMAR SCHOOL.

See CHARITY, 1, 2.

GUARDIAN AND WARD.

See TRUST.

HEIR.

A person domiciled in *England*, who was indebted in money upon bond, died intestate, leaving real estate in *Scotland*, and the bond debts were paid by the heir out of the produce of the real estate in *Scotland*.

Held, that the right of relief or demand against the personal estate, which by the law of *Scotland* is given to the heir who has paid moveable debts, is capable of being made available in *England*, where the personal estate is the primary fund for the payment of all debts. *The Earl of Winchelsea* v. *Garetty.* Page 293

See ACCUMULATION, 3.
EXONERATION.
PAUPER.

HUSBAND AND WIFE.

See PLEADING, 1.
POWER, 2.

INFANT.

Where a decree had been made in two suits, framed for the purpose of administering the testator's personal estate only, and the de-

visee of the real estate was an infant, a suit by mortgagees, for the purpose of realising their security by a sale of the mortgaged premises, was properly instituted.

In a suit for realising a mortgage security, where the devisee or heir of the mortgagor is an infant, the Court usually directs a reference to the Master to inquire whether a sale of the mortgaged premises will be for the benefit of the infant; but, where it is clear that such sale will be for the infant's benefit, the Court will direct a sale in the first instance. *Davis* v. *Dowding*. Page 245

See STATUTE, 5.

INJUNCTION.

Injunction granted to restrain the Defendant from running an omnibus having upon it such names, words, and devices as to form a colourable imitation of the words, names, and devices on the omnibuses of the Plaintiffs. *Knott* v. *Morgan*. 213

INTEREST.

See LOCO PARENTIS.
MORTGAGE.
PRINCIPAL AND SURETY, 2.
WILL, 6.

INTERNATIONAL LAW.

See HEIR.

JURISDICTION.

See PRACTICE, 4. 13.
VENDOR AND PURCHASER, 3.

LACHES.

See TRUST.

LEGACY, SPECIFIC.

A testatrix bequeathed and appointed 1800*l.* consols and 300*l.* long annuities, and all monies over which she had the power of appointment under a particular deed, and all the residue of her personal estate, upon certain trusts: Held, that the gift of the consols and long annuities was specific. *Kampf* v. *Jones*. Page 756

See LOCO PARENTIS.
PRACTICE, 9.

LEGACY DUTY.

See WILL, 11.

LIEN.

See SOLICITOR AND CLIENT, 5.

LIMITATION.

See DEED, 2.
DEVISE, 3.
WILL, 9, 10.

LIS PENDENS.

See PLEADING, 4.

LOCO PARENTIS.

A testator became bound to the parish for the support of an ille-

illegitimate child of his son, and he made weekly payments until his death: Held, that he had placed himself in *loco parentis*, and that interest was payable from the testator's death on a legacy given by him to the child, though made payable on attaining twenty-one. *Rogers* v. *Soutten*.

Page 598

MAINTENANCE.

See WILL, 7.

MISJOINDER.

See PLEADING, 1.

MISTAKE.

See VENDOR AND PURCHASER, 1.

MONEY.

See WILL, 2.

MORTGAGE.

Rule as to the computation of subsequent interest, where the amount of the principal, interest and costs, due upon a mortgage, has been found by the Master's report. *Brewin* v. *Austin*. 211

See INFANT.
STATUTE, 5.

MORTMAIN.

It is contrary to the policy of the mortmain act to permit testamentary gifts of money to be laid out on land, as an inducement to draw land into mortmain.

A testator gave the residue of his personal estate to his executors and other persons, with a request that they would be pleased to entreat the lord of the manor of *Devonport* to grant a spot of ground suitable for the erection of dwellings to be appropriated to a charitable purpose.

Held, that the bequest did not clearly exclude a purchase of the land; and that, even if it did, it was void under the statute of mortmain. *Mather* v. *Scott*.

Page 172

See CHARITY, 3.

MOTION.

See PRACTICE, 16.
SOLICITOR AND CLIENT, 1.

MUNICIPAL CORPORATION ACT.

Demurrer to an information, seeking relief against the corporation of *Poole*, and the person who had been town clerk before the passing of the municipal corporation act, in respect of the compensation awarded by the council to such town clerk under the provisions of that act, allowed. *The Attorney-General* v. *The Corporation of Poole*. 190

NEW ORDERS (1837).

See PRACTICE, 3. 13. 18.

NEXT OF KIN.

See ACCUMULATION, 3.
EXONERATION.

NOTICE.

A., one of several executors, who alone acted, took an assignment of his son's interest in the residuary estate of the testator, as a security for advances made by *A.* to his son, without giving notice of the assignment to his co-executors. After the death of *A.* and the institution of a suit by a surviving executor for the administration of the testator's estate, the son assigned the same interest, without notice of the prior assignment, for valuable consideration to *B.*, who gave notice of his assignment to the surviving executor: Held, that the knowledge which one of several executors has of an assignment made to himself by a legatee is not sufficient to prevail against a subsequent assignee of the same interest who gives notice to a surviving executor, and that the assignment to *B.* was consequently entitled to priority. *Timson* v. *Ramsbottom.* Page 35

PARTIES.

See PLEADING, 1. 4.

PARTNER.

See PLEADING, 2.
TRUST.

PAUPER.

The general rule is, that a party who sues or defends *in formâ pauperis* shall have only such costs as he has paid or become liable to pay; but the Court has a discretion in each case.

An heir at law, defending *in formâ pauperis*, in a suit to establish a will, was held, under the circumstances, to be entitled only to pauper costs. *Stafford* v. *Higginbotham.* Page 147

See PRACTICE, 12. 14.

PETITION.

See SOLICITOR AND CLIENT, 1.

PIRACY.

See INJUNCTION.

PLEA.

See PLEADING, 4.

PLEA OF SETTLED ACCOUNT.

See PLEADING, 2.

PLEADING.

1. Demurrer, on the ground of misjoinder of Plaintiffs, to a bill by husband and wife and their infant children, by the husband as next friend, for the administration of the estate of a testator under whose

whose will the wife was entitled to separate estate, allowed; and leave given to amend the bill by inserting a next friend for the wife and infant children, and making the husband a Defendant. *Wake* v. *Parker*. Page 59

2. A bill was filed by residuary legatees against the executor and surviving partner of the testator, for an account of the partnership transactions. It charged that an unfair valuation of the partnership stock had been made by a clerk of the surviving partner; and that there was no settled account between the Defendant, or that, if any, the same was fraudulent and collusive. The Defendant, the surviving partner, pleaded a settled account with the executor to the whole bill, except such parts thereof as were comprised in his answer in support of the plea, and by which he denied any fraud or collusion whatever: Held, first, that the plea, being to part of the relief and part of the discovery, instead of to the whole of the relief and part of the discovery, was irregular in point of form, but leave was given to amend; secondly, that the Defendant was not bound to set forth the settled account, or aver that he had delivered up the vouchers to the executor; and, lastly, that though the charge of an unfair valuation of the partnership stock was not expressly denied by the answer, the plea did not, therefore, cover too much, as such a valuation might have been admitted consistently with a just final account.

The case of *Bowsher* v. *Watkins* does not establish the general proposition, that in every case a bill may be filed against an executor and the surviving partner of the testator, without charging and proving fraud or collusion between them. *Davies* v. *Davies*. Page 534

3. The Plaintiff by his bill sought to set aside an agreement, entered into by him with the Defendant, for the purchase of the secret of a process of manufacture, on the ground of fraud; and of the Defendant possessing no such secret. By the agreement, as stated in the bill, neither of the parties were to divulge the secret. The Defendant demurred to such of the interrogatories of the bill as sought a discovery of the nature of the secret, and he answered the remainder of the bill, denying all fraud, and insisting on the existence of the secret process: Held, that the Defendant was bound to discover the nature of the secret. *Carter* v. *Goetze*. 581

4. Where a Plaintiff sets down a plea of *lis pendens* for argument, he admits that the two suits are for the same matter, and the plea will be allowed, unless defective in its form.

If the Plaintiff does not in the case of a plea of *lis pendens* obtain an order of reference to the Master to inquire whether the two suits are for the same matter, the Defendant

fendant may, after a month, dismiss the bill.

On the allowance of a plea to the whole bill, the cause is not out of court until a subsequent order has been obtained dismissing it. With some exceptions as to costs, the proceedings in the Court of Exchequer on the allowance of a plea are substantially the same as in this Court. *Tarleton* v. *Barnes.* Page 632

5. Parties entitled to one fourth of an ascertained fund, vested in trustees, held entitled to sue for their one fourth share, without making the parties entitled to the other three fourths parties to the suit. *Hutchinson* v. *Townsend.* 675

See MUNICIPAL CORPORATION ACT.

PORTION.

See DEED, 3.

POWER.

1. *A.*, by his marriage settlement, conveyed his real estates to trustees and their heirs, to the use of himself for life, with remainder to the same trustees, to preserve contingent uses; and after the death of *A.* to other trustees for a term of years, to secure a jointure for his wife, with remainder to the use of such children of the marriage as the husband and wife jointly, and in default of a joint appointment, the survivor of them should appoint, with remainder, in default of any appointment, to all and every the sons and daughters of the marriage living at the death of the survivor of the husband and wife, and the children (also living at such period) of such sons and daughters as should be then dead, in equal shares, as tenants in common, with remainder to the right heirs of the settlor.

A. became bankrupt before he had made any appointment. After his bankruptcy he and his wife executed a deed, purporting to be a joint appointment; and, after the death of the bankrupt, and subsequently to the filing of the bill, his widow executed a deed, purporting to be an appointment to the same children in whose favour the joint appointment had been made.

Held, that the joint power was destroyed by the bankruptcy, and that, the contingent limitation to the children in default of appointment having failed for want of a particular estate of freehold to support it, the appointment by the surviving wife was invalid. *Hole* v. *Escott.* Page 444

2. A power of appointing a fund between *A.*, *B.*, and *C.* is well executed by an appointment between *A.*, *B.*, and the husband of *C.*; but an appointment to such husband of a share of the fund, after deducting therefrom a debt due to the appointor, is an invalid execution of the power, so far as regards the direction to deduct.

A power to appoint among children, "subject to such regulations

lations and directions with regard to the settling the shares in trust for their separate use, and with, under, and subject to such powers, provisoes, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them)," does not authorise an appointment to grandchildren.

A widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children, for life, with remainder to their children; and in case any of her children died in her lifetime, she gave the share to his or her issue; and in case there should be no issue, the survivors of *A.*'s children were to take: Held, that the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid. *Hewitt* v. *Lord Dacre.* Page 622

3. A testator gave to his widow, "for the benefit and advantage of his children," power of selling his *Woodfoot* estate. By a codicil he expressed himself (in effect) thus: "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife *shall* and may divide and proportion among my said children as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow: Held, that a trust for the children was created by the will, and that they were entitled equally.

Held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty. *Grieveson* v. *Kirsopp.* Page 653

4. A real estate was vested in trustees, on trust, to convey to the *cestui que trust* at a particular period; and a power of sale was given to the trustees "during the continuance of the trust." The trustees having neglected to convey at the period stated: Held, that they could not, after that time, execute the power of sale, though the trusts still continued.

A testator devised his real estate, as to one fifth part thereof, to trustees in fee, on trust to pay the income to his son *William* for life, and after his death to convey it to *William*'s children; and as to another fifth, to apply the income towards the maintenance of the testator's daughter, until she should attain twenty-five or be married; and on her attaining twenty-five, if unmarried, to convey the same to her, but if she should marry before that age, then to settle it in a particular way. The testator then gave to his trustees a power of selling the property "during the lifetime or widowhood of his wife, or at any time afterwards during the continuance

tinuance of the trusts by his will reposed." The widow and *William* died, and the daughter attained twenty-one and married, but no conveyance had been made by the trustees: Held, that the power of sale could not then be exercised by the trustees, for though the trusts still "continued," yet they continued through the neglect of the trustees to convey, and not in the way contemplated by the testator. *Wood* v. *White*. Page 664

5. One having a power of appointing a fund amongst her children, or remoter issue, appointed a sum to one of her children absolutely, and then attempted to limit it over to the unborn children of such child. The appointment to the grandchildren being too remote: Held, that the prior absolute gift to the child was effectual. *Kampf* v. *Jones*. 756

PRACTICE.

1. A case laid before counsel was excepted in an order for the production of documents, the Court considering itself bound by the decision upon the authority of which the case was held to be privileged, but expressing dissent from that decision. *Nias* v. *The Northern and Eastern Railway Company*. 76. 312.

2. The Plaintiff obtained an order to amend, without requiring a further answer, amending the Defendant's office copy. The amendments required a new engrossment, and the Plaintiff, without having called on the Defendant for his office copy, paid 20*s*. costs for the amendments, which were accepted by the Defendant's clerk in Court, and after eight days filed his replication.

The acceptance by the Defendant's clerk in Court of the costs of the amendments was a waiver of the Plaintiff's omission to call for the Defendant's office copy; and a motion, on the part of the Defendant, for leave to answer notwithstanding the replication, was refused, but without costs. *Boswell* v. *Tucker*. Page 188

3. Where the decree made by the Vice-Chancellor, and an order upon petition in the cause was afterwards made by the Master of the Rolls reserving the costs of the petitioners, the reservation of costs does not give authority to the Master of the Rolls to hear a petition in the cause presented after the 20th of *May* 1837; but such petition must, under the new orders, be heard by the Vice-Chancellor. *Senior* v. *Wilks*. 210

4. A decree *nisi* was taken against a Defendant, who did not appear at the hearing. Judgment was pronounced by the Master of the Rolls, after his appointment to the office of Lord Chancellor, by consent of all the parties to the cause except the Defendant and another party who did not appear at the hearing. The Defendant could only

only shew cause against the decree *nisi* by setting down the cause to be heard against him; and a petition to stay proceedings to make the decree absolute, on the ground of his being no party to the consent to have the cause decided by the Master of the Rolls after he became Lord Chancellor, was dismissed with costs. *Moore* v. *Frowd.* Page 242

5. A bill having been dismissed with costs on the non-appearance of the Plaintiff's solicitor, the cause was, upon a petition supported by affidavit, ordered, under the circumstances, to be set down again to be heard upon payment of costs by the Plaintiff. *Hale* v. *Lewis.* 318

6. A plea and answer were ordered to stand for an answer, with liberty to the Plaintiff to except; and the order was silent as to costs.

A motion to have the costs occasioned by the plea and answer taxed, and that the Defendant might be ordered to pay the same when taxed, was refused. *Yarnall* v. *Rose.* 326

7. On a motion made on behalf of a Defendant who is in contempt for want of appearance, the Defendant cannot be heard without entering a conditional appearance with the registrar, to be void if the application should succeed, and good, if it should fail.

Service of a *subpœna* at the dwelling-house in *London* of a peeress of *Scotland,* who was absent in *Scotland,* and claimed to be a domiciled *Scotchwoman,* was held to be good service; and the Court held, that an order *nisi* for a sequestration was regularly obtained, and made absolute, after personal notice of the order *nisi,* which was served upon the Defendant in *Scotland.* *Davidson* v. *The Marchioness of Hastings.* Page 509

8. In an inquiry in the Master's office, the parties proceeded by affidavit: Held, that the Plaintiff could not use the answer of one Defendant, by way of an affidavit, as evidence against a co-Defendant. *Hoare* v. *Johnstone.* 553

9. An executor denied assets, but his answer disclosed a personal liability for payment of the Plaintiff's legacies. The Court made an order for immediate payment, without directing the accounts to be taken. *Rogers* v. *Soutten.* 598

10. The Defendant having failed to appear at the hearing, the Plaintiff took such decree as he could abide by. It afterwards turned out that the affidavit of service of the *subpœna* to hear judgment was defective; the Court refused to reinstate the cause, suggesting that the proper mode was to set it down again at the bottom of the list. *Evans* v. *Evans.* 604

11. The Defendant, by his answer, admitted that he had in his possession certain documents relating to the matters in question, but he stated that several of them were privileged.

privileged. The Plaintiff having moved for the production of all the documents, the Court admitted an affidavit to be read on the part of the Defendant, specifying which of them were privileged. *Parsons* v. *Robertson.* Page 605

12. An order to sue *in formâ pauperis* is ineffectual until served; and the party obtaining it was held, on that ground, liable to pay *dives* costs. *Ballard* v. *Catling.* 606

13. A suit was commenced previous to the orders of 1837. A Defendant afterwards filed a demurrer, and set it down at the Rolls: Held, that the orders of 1837 did not give to the Plaintiff such a right of selecting his Court as to render the proceedings of the Defendant irregular. *Cane* v. *Martin.* 607

14. It is not necessary that the notice of motion of a pauper should be signed by his six clerk. *Perry* v. *Walker.* 663

15. An application to hear a cause as a short cause cannot be made until after the *subpœna* to hear judgment is returnable.

Where, on the certificate of the Plaintiff's counsel, an application is made at the Rolls to hear a cause as a short cause, and the Defendant's counsel states, that the cause is not in his judgment a proper one to be so heard, the Court will not permit any discussion on the point, but will at once refuse the application. *Reeves* v. *Gill.* Page 671

16. The Master's certificate of a Defendant's default in the production of papers, founded on an admission contained in the answer of another party, is irregular.

Where the four-day order is issued upon an irregular certificate of default, in the production of papers, &c. before the Master, the proper course is to apply to the Court to discharge the order, and take the certificate off the file; and not to take exceptions to the Master's certificate. *Kemp* v. *Wade.* 686

17. *A.* and other parties entitled to a testator's estate, by power of attorney, appointed *B.* to collect and manage the estate; *B.* employed *C.*, a solicitor, for that purpose, who received the assets, and after deducting the amount of his untaxed bill of costs, paid over the balance to *B.* *A.* filed a bill against *B.* and *C.* for an account, and for the delivery up of documents relating to the testator's estate: Held, that *A.* was not entitled to the production of documents relating to the testator's estate admitted by *C.* to be in his possession. *Adams* v. *Fisher.* 753

18. The Plaintiff undertook to speed, and the terms were, that he should set the cause down for hearing, and serve a *subpœna* to hear judgment, in *Easter* term; he served the *subpœna* and set down the cause

cause to be heard in *Easter* term; but the *subpœna* to hear judgment was returnable in *Trinity* term: Held, that this was not a compliance with the undertaking. *Burgess* v. *Thompson.* Page 762

19. A suit was instituted against the representatives of a testator, in respect of a breach of trust; and a decree was afterwards made in a creditor's suit against the same representatives, and an account of the debts, &c. was directed to be taken. The Plaintiff in the first suit established his claim, so far as he could in the creditor's suit, and afterwards brought on the first suit for hearing, when, there appearing a deficiency of assets, he waived further relief, and took the securities on which the trust fund had been improperly invested: Held, that the Plaintiff in the first suit was entitled to his costs out of the assets in the second. *Costerton* v. *Costerton.* 774

20. There were two suits brought against the representatives of a testator, one a creditor's suit and the other for a breach of trust. The accounts were taken in the first suit, and the debts, &c. ascertained; but the assets appeared insufficient to pay the debts in full, in the event of the claims of the Plaintiff in the second suit being substantiated.

The second cause not having been heard, the Court ordered a part of the assets to be set apart to answer the costs in the second suit, and a proportionate part of the assets to be reserved to answer the claims of the Plaintiff in the second suit, and the residue to be apportioned and paid to the creditors in the first suit. *Illingworth* v. *Nelson.* Page 776

See PLEADING, 4.
SOLICITOR AND CLIENT, 1.
STATUTE, 1, 2.

PRINCIPAL AND SURETY.

1. A contractor undertook to perform certain works, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work: Held, that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. *Calvert* v. *The London Dock Company.* 638

2. *B.* and *C.* were jointly bound as sureties for *A.*; *D.*, the wife of *A.*, charged her separate estate to indemnify *B.* from all losses, &c. The whole loss was borne by *B.* alone, who afterwards, without the concurrence of *D.*, released *C.* his co-surety: Held, that *D.*'s separate estate was thereby released from the moiety of the losses.

A deed, after reciting that *A.* had agreed to charge certain pro-

perty with all sums which *B.* should pay as surety for a third party, together with interest on all such payments, and all such costs, &c., as he might sustain, &c., proceeded to charge the property with the payment of all such sums, costs, &c., *with interest as aforesaid:* Held, that interest was not payable on the costs, &c.

By the same deed, *A.* agreed that *B.* should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by *B.:* Held, that he was entitled to interest thereon at 4 per cent. *Hodgson* v. *Hodgson.* Page 704

PRIORITY OF INCUMBRANCES.
See NOTICE.

PRIVILEGE.
See PRACTICE, 1.

PRODUCTION OF PAPERS.
See PRACTICE, 1. 11. 17.

RECEIVER.
See TRUSTEE, 1.

RECOVERY.
See REMOTENESS.

RELEASE.
See TRUST.

REMOTENESS.

The trusts of a term, limited previous to an estate tail, for raising extra portions on the death of a party without issue, was held invalid, as tending to a perpetuity; because, being limited antecedently to the estate tail, it could not be defeated by a recovery.

Two estates were devised to trustees, for 500 years, with remainder, as to one estate, to *A.* for life; with remainder to his first and other sons, in tail; with remainder to *A.*'s daughters, equally, in tail general; with remainder to *B.*, for life; with remainder to his first and other sons, in tail; with remainder to his daughters, equally, in tail general. The other estate was, *mutatis mutandis*, similarly settled on *B.* and his issue, with remainder to *A.* and his issue.

The trusts of the term were declared to be, to raise 2000*l.* each, for *C.* and *D.*, "and if *A.* or *B.* should depart this life without issue, whereby the survivor of them would become entitled to" the two estates, to raise a further sum of 2000*l.* a piece, for *C.* and *D.*

B. died

B. died leaving issue, and afterwards *C.* died without issue, whereby the two estates centred in the issue of *B.*: Held, that the trust for raising the further sums of 2000*l.* did not take effect. *Case* v. *Drosier.* Page 764

RESIDUE.

See WILL, 7.

RETAINER.

See EXECUTOR, 1.

SEQUESTRATION.

See PRACTICE, 7.

SERJEANT AT ARMS.

See STATUTE, 1.

SET-OFF.

T. B. was indebted to *C. B.*, his sister, in the sum of 1878*l.* He became bankrupt, and shortly after his bankruptcy *C. B.* made her will, whereby she gave legacies of 500*l.* and 2000*l.* to her executors, in trust to pay the interest thereof (as to the 500*l.* after the decease of her mother), to *T. B.* for his life, without power of anticipation, and free from his debts; and after his decease, to pay the principal to such persons as he should appoint, and in default of appointment, to his executors and administrators, for his and their own use and benefit.

T. B. died without having obtained his certificate, and without having attempted to make any appointment:

Held, that the executors of the testatrix had no right to set off the debt due from *T. B.* to the testatrix against the legacies, but that the assignee of *T. B.* was entitled to so much of the legacies as the assets were sufficient to pay. *Cherry* v. *Boultbee.* Page 319

SHIP.

See VENDOR AND PURCHASER, 3.

SHORT CAUSE.

See PRACTICE, 15.

SOLICITOR AND CLIENT.

1. Where a solicitor has neglected to take out his certificate for more than a year, admission *de novo* is in no case necessary, (the words "null and void," as applied to his admission in the 37 *G.* 3. *c.* 90. *s.* 31., being used in a qualified sense,) and re-admission will restore him to a capacity to practise, unless he has been guilty of some fraud in procuring it.

Whether re-admission is necessary in a case where an attorney or solicitor has not taken out his certificate, nor practised for more than a year after his admission, *quære.*

A *motion*, on behalf of a person who had obtained an order for the taxation of his solicitor's bills of

costs, to discharge that order, and to have it declared that his solicitor was incapable of acting as such under the 39 *G.* 3. *c.* 90., and consequently not entitled to claim his bill of costs, was held to be open to objection (if properly taken) for irregularity; the Court considering that such an application ought to have been made by petition. *Ex parte Chambers, In Re Wilton.* Page 497

2. Where a solicitor refuses to deliver up deeds and papers in his possession, except upon payment of his bill of costs, the Court has jurisdiction to order taxation of such bill, and the delivery up of the deeds and papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing and other general business, and not in respect of the prosecution or defence of any suit or action. *In the Matter of Rice.* 181

3. Where a Plaintiff brought an action against his solicitor, and the solicitor pleaded a set-off in respect of his bills of costs, and the proceedings in the action, and under a reference to arbitration, in which all questions as to the solicitor's bills of costs might have been determined, failed, and the Plaintiff afterwards, in this Court, obtained an *ex parte* order to tax his solicitor's bills of costs, and to have the deeds which were in the possession of his solicitor delivered up, a motion to discharge that order was refused, but without costs, as the Plaintiff ought to have made a special application. *Jones* v. *James.* Page 184

4. A bill having been filed without the authority of one of the co-Plaintiffs, the Court, after replication, ordered his name to be struck out as co-Plaintiff, and the costs of suit and of the application to be paid by the solicitor who filed the bill. *Tabbernor* v. *Tabbernor.* 679

5. The lien of solicitors cannot interfere with the equities between the parties.

A sum was found due from the Plaintiff to the Defendant; and, on the other hand, the Defendant was ordered to pay the costs of suit: Held, that the lien of the Defendant's solicitor, for his costs, extended only to the ultimate balance due from the Plaintiff, after deducting the costs payable to him by the Defendant. *Bawtree* v. *Watson.* 713

See PRACTICE, 17.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1. 3.

STATUTES.

1. The Court will not make an order for a Serjeant at Arms, unless the affidavit of the solicitor or town agent, by whom the writ of attachment was issued, states his belief that due diligence had been used in endeavouring to apprehend the Defendant. *Nelthorpe* v. *Wright.* 253

2. An

2. An application for leave to amend by striking out the name of a Plaintiff, must be made to the Court, the Master having no jurisdiction under the 3 & 4 *W.* 4. *c.* 94. in a matter which may have the effect of altering the situation of the Defendant, with respect to his security for costs. *Read* v. *Treacher.* Page 317

3. A copartnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, cannot, under the 3 & 4 *W.* 4. *c.* 98., and the other acts now in force respecting the Bank of *England*, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of giving such acceptance. *The Bank of England* v. *Anderson.* 328

4. A bank at *Kingston*, in *Upper Canada*, drew a bill payable at sixty days after sight, directed to *G. P.*, manager, Joint Stock Bank, *London*, which was accepted by *G. P.*, who was the manager of the *London* Joint Stock Bank, but not a shareholder or partner in that concern, in these words: "Accepted at the *London* Joint Stock Bank. — *G. Pollard.*" By an arrangement between the *London* Joint Stock Bank and the *Canada* Bank, the *London* Joint Stock Bank guaranteed the payment at maturity of all bills of exchange so drawn by the *Canada* Bank to the extent of 40,000*l.*

Held, that this transaction was a violation of the exclusive privileges of the Bank of *England* within the 3 & 4 *W.* 4. *c.* 98., and the other acts relating to the bank. And an injunction was granted accordingly against the *London* Joint Stock Bank, *G. P.*, and their agents. *The Bank of England* v. *Booth.* Page 466

5. The 1 *W.* 4. *c.* 47. does not empower the Court, even for the benefit of the infant heir, to direct a mortgage of his real estates for payment of the ancestor's debts to which it is liable. *Smethurst* v. *Longworth.* 603

STOCK.

See WILL, 2.

SUBPŒNA. — SERVICE OF.

See PRACTICE, 7.

TAXATION OF COSTS.

See SOLICITOR AND CLIENT, 2, 3.

TERM.

See REMOTENESS.

THELLUSSON ACT.

See ACCUMULATION, 1, 2, 3.

TRUST.

Account of deceased partner's estate directed after a lapse of thirty years, and repeated changes in

the firm, and after several deeds and a release had been executed by the parties beneficially interested; the surviving partners being the executors of the deceased partner and guardians of the *cestuis que trust*, and the settlements being partial only, and founded on insufficient knowledge, by the *cestuis que trust*, of the partnership affairs and accounts.

A., *B.*, and *C.*, in 1796, became partners, as merchants, under articles for seven years, and it was provided, that if either partner died in the mean time, the partnership should be determined, as to his share, from the 1st of *May* following his death; and that, thereupon, an account should be taken, and, after payment of debts, "payment, appropriation, and delivery" should be made between the surviving partners and the executors of the deceased partner, of the residue of the monies, goods, &c., of the partnership. In 1801 *B.* died, and appointed his wife and surviving partners, *A.* and *C.*, his executors and guardians of his infant children, who were his residuary legatees. *A.* and *C.* only proved the will; and, having caused a valuation and account of the partnership's assets to be made, a balance sheet was settled up to the 1st of *May* 1801, shewing what amount was considered due to the testator's estate (which included outstanding credits to a large amount), and his estate was credited accordingly in the partnership books, and the partnership continued by the surviving partners, but no severance of the assets was made.

In *May* 1809 the eldest son came of age, and an account was stated by the executors, of the testator's residuary personal estate, but which assumed, as its basis, the valuation and account made on the testator's death: another account was stated of the debts and credits remaining unpaid and uncollected, shewing what was then divisible: and another of the monies expended for the eldest son's maintenance. A deed dated *September* 1809, between *A.* and the eldest son, was executed, on which these accounts were indorsed, and *A.* covenanted for the payment, by instalments, of the share due to the eldest son, so far as the same had been realised; and the eldest son declared he was "content and satisfied with the disclosures thus far made, and accounts thus far given," &c.; and it was provided he should not be prevented from claiming any further share "not as yet received, or fallen in, or accounted for."

In 1810, 1815, 1821, 1826, and 1830, changes took place in the partnership firm. There were three younger children, who attained twenty-one respectively, in 1812, 1813, and 1820, when similar accounts, founded on the same basis, were stated to each of them by the executors; and a similar deed of settlement executed by the

the two former, and a release by the latter, and further divisions of the testator's assets made accordingly. In 1816, the only other child died an infant, and then also a division of assets was made; and, in 1822, a deed of release was executed by the trustees of the settlement of one of the daughters, in respect of a balance not included in the deed executed by her. The bill was filed in 1831, by the several children and their representatives:

Held, that *A.* and *C.* being executors and guardians as well as surviving partners, and the release being partial only, and founded on insufficient knowledge by *cestuis que trust* of the partnership affairs and accounts, the Plaintiffs were not precluded, by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, and claiming a share in the profits arising from the testator's assets having been used in the business of the successive partnerships. *Wedderburn* v. *Wedderburn*. Page 722

See DEVISE, 2.
REMOTENESS.

TRUSTEE.

1. Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by the Plaintiff, who was entitled to the rents and profits for her life against the trustees, the Court ordered a receiver to be appointed, and the costs of the suit to be paid by the trustees. *Wilson* v. *Wilson*. Page 249

2. A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; and that, notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction. *Hodgson* v. *Hodgson*. 704

See DEED, 2.
NOTICE.

UNCERTAINTY.

See DEVISE, 2.

VENDOR AND PURCHASER.

1. Where an estate is purchased at an auction under a mistake as to the lot put up for sale, the Court will not decree specific performance against the purchaser, but leave the vendor, if he has sustained any damage by the mistake of the purchaser, to his remedy at law.

A bill for specific performance was accordingly, under the circumstances, dismissed without costs. *Malins* v. *Freeman*. 25

2. A

2. A vendor and his solicitor fraudulently, and in the absence of the purchaser's solicitor, obtained from a purchaser (who was desirous of completing the purchase, and had entered into possession,) the purchase-money and covenants for the production of title deeds, while the title as to a part of the purchased premises was still under investigation.

On a bill filed by the purchaser against the vendor and his solicitor, it was held, that the Plaintiff was entitled to have the contract rescinded, and his purchase money, together with all costs, charges, and expenses (including auction duty), repaid to him, and to have the deeds of covenant executed by him delivered up to be cancelled. *Berry* v. *Armistead.* Page 221

3. An agreement was entered into for the sale of a ship to *A.* and *B.* (one third share to *A.* and two thirds to *B.*), at the price of 750*l.*; and, if default should be made by the purchasers, for the resale of the ship, the deficiency, if any, upon the resale, to be made good by the defaulting purchasers. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from *A.*, and two bills of exchange, drawn by the vendors, and accepted by *A.*, for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase-money for the one third share and two third shares of the ship was expressed to have been paid by *A.* and *B.* respectively. The acceptances of *A.* were dishonoured, and he became bankrupt.

On a bill filed by the vendors, who had become entitled to the whole interest in the purchase-money, against *B.*, who had become the sole owner of the ship by purchase from *A.*'s assignee, praying specific performance of the agreement, and payment of the unpaid purchase-money by *B.*, or that the ship might be sold, and the proceeds applied in payment, the Court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase-money by *B.*, or a resale of the ship, in default of payment in a limited time. *Lynn* v. *Chaters.* Page 521

See DEED, 1.
POWER, 4.

VOLUNTARY DEED.

1. A father, who had four natural daughters, and a legitimate son, entered into an agreement with his son, evidenced by certain deeds, whereby the father covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father.

The son paid some of the father's debts, and died before the covenant on the part of the father was performed,

performed, having by his will given the whole of his property to his father, who became the son's personal representative.

A demurrer to a bill filed by one of the natural daughters, and praying to have the agreement executed against the estates of the father and son, was allowed.

Where two persons for valuable consideration as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, though either of the two might do so against the other. *Colyear* v. *The Countess of Mulgrave.* Page 81

2. Among the trusts of a settlement (the subject of the settlement being property limited to the separate use of the wife), it was provided, that the trustees should effect a policy af assurance to the amount of 3000*l.* on the life of the wife, and annually pay the premium out of the trust-money during the life of the wife, and stand possessed of the assurance in trust after the decease of the wife to invest the 3000*l.* when received, and pay the interest to the husband for his life, if he should survive the wife, and after the decease of the husband, to pay the 3000*l.* to such person or persons as the wife should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the persons entitled under the statute of distributions.

There were no children of the marriage, and the wife, having survived her husband, and being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, and by his will appointed *G.* his executor and residuary legatee. *G.* continued to pay the premium, and on the death of the assured, received the value of the policy:

Held, on a bill filed by the next of kin of the wife against *G.* and against the executor and residuary legatee of the wife, that the assignment was valid, snd that *G.* was entitled to the value of the policy. *Godsal* v. *Webb.* Page 99

WAIVER.

See PRACTICE, 2.

WILL.

1. A testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of *Tawleaven Row* all which might remain of her money after her lawful debts and legacies were paid: Held, that the persons found to be inhabitants of *Tawleaven Row* were entitled to the residue of

of the testatrix's general personal estate. *Rogers* v. *Thomas.* Page 8

2. A testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of money to the five children of *E. D.*: Held, that by the words "whatever remains of money," the testatrix referred to her general residuary personal estate. *Dowson* v. *Gaskoin.* 14

3. A testator directed his real and personal estate to be sold, and the monies arising from the sale to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will. He afterwards gave an annuity to his wife by an unattested codicil: Held, that the annuity was well charged on the real estate. *Swift* v. *Nash.* 20

4. A testator gave the dividends of stock to his brother and three sisters, and after the decease of either of them, leaving any children, the share of him or them so dying to such children, for their lives, with benefit of survivorship; and in case either of his brother and sisters should die without leaving such issue, then the survivor or survivors to take the dividends; and after the decease of the survivor of the children of his brother and sisters, he directed the said stock monies and all interest then due to be distributed according to the statute of distributions:

Held, that the brother, who survived his three sisters, two of whom died without issue, was entitled to a life interest in three fourths of the capital, and that the capital was undisposed of, and belonged to the next of kin of the testator, living at his death. *Cooke* v. *Bowler.* Page 54

5. The testator gave the sum of 500*l.* stock to *S. T.*, to receive the interest during life, and then to her issue; but in case of her death without issue, the said 500*l.* stock to be divided between her father's children by his second wife; and in default of any children by his second wife being living at the testator's death, over:

Held, that *S. T.* took an absolute interest in the sum of 500*l.* stock. *The Attorney-General* v. *Bright.* 57

6. A testator gave to *W. H.* and *M. H.* the amount of the bond he held for 1000*l.*: when they got the principal money paid to them, they then give to their uncle *J. B.* the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond: Held, that *W. H.* and *M. H.* were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal. *Harcourt* v. *Morgan.* 274

7. A tes-

7. A testator directed his executors to apply the dividends of the property belonging to him, which might remain after paying legacies and providing for the payment of annuities, with his funeral expenses, his debts being all paid, to the maintenance, education, and benefit of *R. S.*, as they should judge most advantageous for him; and, in the event of the death of *R. S.* under twenty-one, he directed the dividends to be applied as therein mentioned. *R. S.* survived the testator about two years, and the executors applied a part of the dividends to his maintenance, education, and benefit: Held, that the unapplied part of the dividends, with the accumulations, formed part of the residue. *M'Donald* v. *Bryce.* Page 517

8. Bequest of chattels to two legatees, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to the other. One of the legatees died in the testator's lifetime: Held, that the other was absolutely entitled by survivorship.

Annuities held upon the construction of the will to be cumulative, and not substitutional. *Mackinnon* v. *Peach.* 555

9. A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died without issue, the two nephews to inherit from the brother; and he then stated, that the reason why he left only the interest to his brother and two nephews was, that if they died without issue, the money might go to his three cousins. He desired his legatees to be paid within twelve months, and proceeded; "It is to be understood I leave it to them and their heirs." The brother and nephews died without issue: Held, that, under the will, the brother took an annuity for life only, and was not interested in the fund set apart to answer the annuity of 300*l.* *Ferard* v. *Griffin.* Page 615

10. A testator bequeathed personalty to trustees, to pay the interest to Sir *Gilbert A.*, Baronet, for life, and after his decease, to his eldest son; but in case he should die leaving no son, then, in trust, for the person on whom the baronetcy should devolve, so that each baronet should take the interest for life; and, after the extinction of the baronetcy, to fall into the residue of his estate. At the death of the testator, Sir *Gilbert A.* and his two brothers, *James* and *Robert*, on whom the baronetcy successively devolved, were living. Sir *Gilbert A.* afterwards died without having had any issue: Held, that Sir *James* became absolutely entitled to the property. *Mackworth* v. *Hinxman.* 658

11. A testator bequeathed some specific

cific chattels and a sum of 200*l.* to *A.*, and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the legacy duty and all other deductions, which annual sum was to be paid to *A.* for her life, and after her decease, the principal was to be paid to other parties; and the testator directed his executors to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to *A.* *A.* and the legatees in remainder were strangers in blood to the testator.

Held, that the legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to *A.* and to those in remainder. *Calvert* v. *Sebbon.* Page 672

12. Bequest of copyhold and leasehold property to the testator's widow for life; and at her death, the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his share to be divided amongst the surviving children: Held, that the child of a son who died in the testator's life was entitled to such share as her parent, if he had survived the widow, would have been entitled to. *Le Jeune* v. *Le Jeune.* Page 701

13. A testator bequeathed his personal estate to his brothers and sisters absolutely; and declared, that if any of them should die in his lifetime, or afterwards, without leaving lawful issue him surviving, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue him surviving, his share should be divided amongst his issue; and he declared, that none of the legatees should be entitled to any bequest, until they attained twenty-one. Held, that on attaining twenty-one, the brothers and sisters took absolute interests, and that the limitation over was to take effect only in the event of the death of a legatee under twenty-one, in the lifetime of the testator, or afterwards. *Monteith* v. *Nicholson.* 719

See ACCUMULATION, 1, 2.
DEVISE, 3.
FORFEITURE, 2.
LEGACY.
POWER, 2.
REMOTENESS.
SET-OFF.

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